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A NEW
INSTITUTE
OF THE
IMPERIAL
OR
CIVIL LAW.
WITH
NOTES,

Shewing in some *Principal* Cases amongst
other Observations, how the *Canon* Law,
the Laws of *England*, and the Laws and
Customs of other *Nations* differ from it.

IN FOUR BOOKS.

Composed for the Use of some Persons of Quality.

The Fourth Edition corrected.

By *THO. WOOD*, LL. D. late Rector of *Hardwick, Bucks*,
COMMISSARY and OFFICIAL of that Archdeaconry.

To which is prefix'd, as an INTRODUCTION,
A TREATISE of the first Principles of Laws in General; of
their Nature and Design, and of the Interpretation of them.

L O N D O N:

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A TREA-

TREATISE OF LAWS.

CHAP. I.

Of the first Principles of all LAWS.

ONE would think, that nothing should be better known by Men than the first Principles of those Laws, which regulate the Behaviour of private Persons, as well as the Order of that Society, in which they join together; and that even those who have no Knowledge of reveal'd Religion, by which we learn what these Principles are, should at least discover them in their own Breast, since they are engraven on the Table of our Heart by Nature: And yet it plainly appears, that the most learned of those who were ignorant of that which we call Religion, knew them so little, that they have establish'd such Rules as violate and destroy them.

As for instance, the *Romans* who cultivated the Civil Laws above all other Nations, and have made so great a number of them which are very just, did nevertheless, after the manner of other People, give Licence to take away the Lives of their Slaves, and their own Children: As if that Power, which gave them the Title of a Father and a Master, could dispense with the Laws of Humanity.

This extreme Opposition between the Equity, which clearly appears in these just Laws made by the *Romans*, and the Inhumanity of that Licence, plainly discovers, that they were ignorant of the Source, even of that Justice which they knew; since they acted so grossly contrary to the design of those Principles, which are the Foundations of all the Justice and Equity that is in their other Laws.

B

This

^a Vide l. ult. C. de patr. poss. § 1. & 2. Instit. de his qui s. v. al. § 1. f. ^b Cic. de inv. l. 1. § 2.

I.
The first Principles of Laws were unknown to Pagans.

This is not the only Error from whence we may conclude how much they were Strangers to the true meaning of those Principles; we have another very remarkable Proof of it from the Idea, which their Philosophers have given of the Origine of humane Society, whereof these Principles are the Foundation. For so far were they from discovering and perceiving how to form an Union among Men, that they imagined Mankind lived at first like savage Beasts in the Fields, without any Conversation, Correspondence with, or Relation to one another, until at last a Thought came into one of their Heads, that they might be join'd together in Society, and then he began to civilize the rest, and treat with them how to form it.

I shall not stop here to consider the Causes of that strange Contrariety of Light and Darkeness, which is to be met with among all the most learned Heathens, and how they could know so many Rules of Justice and Equity, without perceiving those Principles on which they depend. The first Elements of the Christian Religion explain this Riddle; and what they teach us of the State of Man, discovers to us the Causes of that Blindness, and at the same time shews us, what are these first Principles which God has established, as the Foundations of all Order in humane Society, and what are the Fountains of all the Rules of Justice and Equity.

II.
The Principles
of Laws.

But although these Principles are not known to us, but by the Light of Revelation, yet that Light discovers them to us so clearly in our own Nature, that we plainly perceive no Man can be ignorant of them, but he that does not know himself; and consequently, that nothing is more astonishing than that Blindness, which deprives him of the sight of them.

III.
The Certainty
of the Principles
of Laws.

Seeing therefore there is nothing more necessary in all Sciences, than to understand the first Principles of them, and seeing that every Science begins with establishing its own Principles, by placing them in such a Light as discovers their Truth and Certainty, that they may serve for a Foundation to all the Particulars which depend upon them; it is a Matter of great Importance to consider what are the Principles of Laws, that we may discover the Nature and Stability of those Rules which depend upon them: And we may judge what kind of Certainty these Principles have, by the double Impression such Truths make upon our Minds, which God teaches us by Revelation, and which he discovers to us by the Light of natural Reason. Upon which Account the first Principles of Laws have more convincing Evidences of their Truth, than the Principles of other humane Sciences: For whereas the Principles of other Sciences, and the particular Truths deducible from them, are only the Object of the Understanding, and not of the Will and Affections, and besides cannot be perceived by all Mens Minds; the first Principles of Laws, and the Detail of essential Rules depending upon these Principles, have such Characters and Marks of Truth, whereof no Man is incapable, and which equally affect the Mind and Heart: So that the whole Man receives deeper Impressions of them, and is more powerfully convinced of them, than of any Truths in all other humane Sciences.

As for instance, there is no Man but perceives both by Reason and natural Impression, that 'tis not lawful to kill or steal, nor to kill or rob others; and he is more fully persuaded of those Truths, than he

he can be of any Theorem in Geometry; And yet even these Truths, that killing and robbing of Men are unlawful, as evident as they are, have not a Certainty equal to that of the first Principles, on which they depend; because these Principles are such Rules as admit of no Dispensation or Exception, to both which these Truths are liable. As for instance, *Abraham* could justly kill his Son, when the Lord of Life and Death commanded him^c; and the *Hebrews* could lawfully seize the Riches of the *Egyptians*, by the Order of the Lord of the Universe, who gave them to that People^d.

We cannot take a more simple and surer Way to discover the first Principles of Laws, than by supposing two prime Truths, which are only simple Definitions. One is, that the Laws of a Man are nothing else but only the Rules of his Conduct; and the other is, that this Conduct is nothing else but the Advances a Man makes towards his End.

IV.
The Knowledge of the first Principles of Laws by the Knowledge of Man.

To discover therefore what are the Foundations of humane Law, we must know what is a Man's End, because his Designation to that End will be the first Rule of the Way and Steps which conduct him thither, and consequently his first Law, and the Foundation of all the rest.

To know the End of any thing, is only to know wherefore it was made; and we may know wherefore a Thing was made, by considering how it is made, and discovering for what Uses its Structure may be design'd; for it is certain, God hath proportion'd the Nature of every thing to the End for which it was design'd.

We all know and feel that a Man hath a Soul which animates his Body, and that in this Soul there are two Faculties, an Understanding which is capable of knowing, and a Will which is capable of loving; and hence we learn, that God made Man for knowing and loving, and consequently to unite himself to some Object, the Knowledge and Love whereof can make him easy and happy; and that all his Actions ought to be directed towards this Object. From whence it follows, that the first Law of Man is his Designation to know and love that Object, which ought to be his End, and wherein he is to find his Happiness; and that this Law being the Rule of all his Actions, ought to be the Principle of all his Laws.

That we may know therefore what is this first Law, what is the Nature of it, and how it is the Foundation of all the rest, we must see for what Object it designs us.

There is none of all the Objects which offer themselves to Man in the whole Universe (though we should include Man himself among the rest) which is found worthy to be his End: For in himself he is so far from finding Happiness, that he sees nothing there but the Seeds of Misery and Death; and if we look round about him through the whole Universe, we shall find nothing that can serve for an End either to his Mind or his Will; that all these Things which we see, are so far from being look'd upon as our End, that we indeed are theirs, and they are made by God only for us^e. For all Things contained

^c Gen. xxii. 2. ^d Exod. xi. 2, 12, 36.

^e Lest thou lift up thy eyes to heaven, and when thou seest the sun, and the moon, and the stars, even all the host of heaven, shouldest be driven to worship them, and serve them, which the Lord thy God hath divided unto all nations under the whole heaven. Deut. iv. 19.

contained in the Earth and the Heavens, are but one great Magazine to supply all our Necessities, and as soon as these cease, the Storehouse of our Provisions shall be destroyed. We may plainly perceive also that every thing in this World is unworthy of our Mind and our Heart: For as to our Mind, God has conceal'd from it any other Knowledge of the Creatures, but that which concerns the Ways of using them, and that the Sciences which are designed for the Knowledge of their Natures, discover nothing in them but what may be of use to us; and that we find all Things wrapped up in so much the greater Darkness, the more we endeavour to penetrate into their Nature beyond what is useful^f: And as to the Heart, Every-body knows that the whole World is not capable of filling it, and that no Man could ever yet make himself happy, with any of those Things which he has loved most, and enjoyed in greatest abundance. This Truth is so clearly perceived by every Man, that we need not take pains to convince any one of it: In fine therefore, we must learn from him that formed Man, that he only being his first Principle, is also ^g his last End; and that there is nothing but God alone who can fill the infinite Vacuity of that Mind and Heart which he made for himself^h.

It is then for God alone, that God hath made Manⁱ: It is to know him, that he gave him an Understanding; it is to love him, that he gave him a Will; and by the Bands of this Knowledge and Love, he would have Men united to himself; that they may find in him both their true Life and their only Happiness^k.

In this Make of Man, who was created to know and love God, consists his Resemblance to God^l. For since God alone is the sovereign Good, it is from his own Nature, that he knows and loves himself, and in this Knowledge and Love consists his own Happiness: And therefore to resemble him, is to be of a Nature capable of knowing and loving him, and to partake of his Happiness, is to arrive at the Perfection of that Knowledge and Love^m.

Thus we discover by this Resemblance of Man to God, wherein consists his Nature, his Religion, and his first Law: For his Nature is nothing else but a Being created after the Image of God, and capable of possessing that sovereign Good, which is to be his Life and his Happiness. His Religion, which is the Collection of all his Laws, is nothing else but the Light and Path which leads to that Lifeⁿ:
And

V.
The Nature
of Man.

VI.
The Religion
of Man.

^f What is commanded thee think thereupon with Reverence, for it is not necessary for thee to see with thine eyes things that are in secret: Be not curious in unnecessary matters. Ecclus. iii. 22.

^g I am Alpha and Omega, the first and the last, the beginning and the end. Rev. xxii. 13. Isa. xli. 1.

^h I shall be satisfied when I awake with thy Likeness. Psal. xvii. 15.

ⁱ The Lord hath made all things for himself. Prov. xvi. 4. And to make thee high above all nations, which he hath made in praise, in name, and in honour. Deut. xxvi. 19. Even every one that is called by my name, for I have created him for my glory, I have form'd him, yea, I have made him, Isa. xliii. 7.

^k For he is thy life. Deut. xxx. 20. This is Life eternal to know thee. John xvii. 3.

^l Let us make man in our image, after our Likeness. Gen. i. 26. Wisd. ii. 23. Ecclus. xvii. 1. Col. iii. 10.

^m We know that when he shall appear, we shall be like him, for we shall see him as he is.

ⁿ John iii. 2.

^o The law is light, and the way of life. Prov. vi. 23.

And his first Law, which is the Spirit of his Religion, is that which commands him to search diligently into this sovereign Good, and to love him with all his Heart, and with all his Soul, which were made on purpose to enjoy him ^o.

VII.
The first Law
of Man.

This first Law is the Foundation and first Principle of all the rest: For this Law which commands a Man to seek after, and to love the sovereign Good being common to all Men, does virtually include a second, which obliges them to Union and mutual Love: Because they being design'd to be united in the Possession of one only Good, which is to make their common Happiness, and to be united so closely in it, that as 'tis said, they shall be but one ^p; they cannot be worthy of that Union in the Possession of their common End, unless they begin their Union, by the Bond of mutual Love in the Way which leads them to it. And there is no other Law which commands every one to love himself, because no Man can love himself better than by keeping the first Law, and following after that Good to which it directs us.

VIII.
The second
Law of Man.

God having design'd Men by these two first Laws for an Union in the possession of their common End, he begins first with tying among them a *prior* Union, in the use of those Means which conduct them to it: And he makes this last Union wherein their Happiness is to consist, to depend upon the good use of that *prior* Union, whereby they form themselves into a Society.

IX.
Humane Society founded on
these two first
Laws.

That he might the better join them together in this Society, he has made it essential to their Nature. And as we perceive in the Nature of Man his Designation to sovereign Good, so we see therein also his Designment to Society, and the several Ties which engage him on all hands to enter into it: And that these Ties of a Man, which are consequent upon his Designation to observe the two first Laws, are at once the Foundation of all the particular Rules of his Duty, and the Fountains of all Laws.

But before we proceed farther to shew the Connexion of all Laws with these two first, we must anticipate a Reflexion, which 'tis natural to make upon the State of this Society, *viz.* That though it ought to be founded upon the two primary Laws aforesaid, yet it will still subsist, when the Intent of these Laws do not much prevail in it; from whence it seems to follow, that it subsists by other Principles. For notwithstanding that Men having violated these fundamental Laws, do thereby strangely alter the State of the Society, from what it would be when built upon these Foundations, and cemented by this Union; yet it is always true, that these divine Laws, essential to Humane Nature, remain immutable, and never cease to oblige Men to observe them; and 'tis also certain, as the Sequel will make appear, that all the Laws which regulate the Society, even in the State wherein we now see it, are only Deductions from these primary Laws. It was necessary therefore to establish these first Principles; and besides, 'tis not possible to comprehend aright the Manner in which we see the Society at present subsist, without knowing

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the

^o This is the first and great commandment. Matt. xxii. 38. Love is the keeping of his Laws.

^p That they all may be one, as thou Father in me, and I in thee, that they may be one in us. John xvii. 21.

the natural State in which it ought to be, and considering it in that Union, which the Divisions of Men have broken, and that Order which they have disturbed.

To the End therefore that we may judge of the Intent and Meaning of the Laws which maintain Humane Society at present, 'tis necessary to draw out a Plan of that Society upon the Foundation of the two primary Laws, that by it we may discover the Order of all the rest, and their Connexion with these two. And then it will appear after what Manner God has provided for the subsisting of Humane Society, in its present State, and among those, who by not observing its prime Laws, ruine the Foundations on which he has built it.

CHAP. II.

A Plan of Humane Society, as it is founded upon the two Primary Laws by two Sorts of Obligations.

I.
How far the
Condition of
Man in this
Life depends
upon the Ob-
servation of
the first Law.

THOUGH Man was made on purpose to know and love the sovereign Good, yet God did not presently put him in possession of his ultimate End, but first placed him in this Life, as the Way for attaining to it. And since Man cannot apply himself to any Object by other Actions, than the Operations of his Understanding, and the Motions of his Will, God hath made the clear Knowledge and immutable Love of that sovereign Good, wherein the Happiness of the Mind and Heart of Man is to consist, to depend upon his Obedience to that Law, which commands him to meditate upon, and to love this only Good, as far as he is capable, during this Life; which he has bestow'd upon him for no other End, but that he may use all Things in it, in Subordination to his pursuit after his perfect Good, which alone is worthy to employ all his Thoughts, and all his Affections^a.

I shall not here enter upon the Explication of those Truths we are taught by Religion, as to the Manner wherein God conducts a Man, and trains him up to this Pursuit: It may suffice for giving an Idea of the Plan of Humane Society, to suppose them at present, and make this general Remark; That for this very End God hath given Man a Life and Being in the Universe, that he might exercise himself in the Observation of the first and second Law; That every thing he beholds either in himself, or in all the other Creatures, are so many Objects given him on purpose to engage him in the Performance of this Duty. For as to the first Law, when he views and makes use of all these Objects,

^a Hear, O Israel, the Lord our God is one Lord. And thou shalt love the Lord thy God with all thine heart, and with all thy soul, and with all thy might. And these words which I command thee this day shall be in thine heart, and thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up. And thou shalt bind them for a sign upon thine hand, and they shall be as frontlets between thine eyes. And thou shalt write them upon the posts of thy house, and upon thy gates. Deut. vi. 4, 5, &c.

jects, he ought to think, that they are to him as so many Pictures and Representations of that which God would have him know and love in himself: And as to the second Law, God hath so disposed of Men, with reference to one another, and of the Universe, with reference to all Men, that the same Objects, which are to excite them to the Love of the sovereign Good, do also engage them to enter into Society, and to mutual Love among themselves: For we neither see nor know any thing, either *without* or *within* a Man, which does not signify that he is a Creature design'd for Society.

Thus *without Man*, the Heavens, the Stars, the Light, the Air, are such Objects as are expos'd to Men, for a common Good to all, and whereof each Man has the entire Use to himself: And all Things which the Earth and Waters bring forth and produce, are also of common Use, but so that before any thing can be used to any particular Person, it must pass through the Hands of many labouring People. This is that which renders Men necessary to one another, and unites them among themselves by mutual Ties and Dependencies, for the Uses of Agriculture, of Commerce, of Arts and Sciences, and for all the other Supplies which the various Necessities of Humane Life may require.

II.
How far the Condition of Man depends on the Observation of the second Law.

Thus *within Man*, we see that God has form'd him by an unconceivable Union of Spirit and Matter, and by this Composition of Soul and Body, he has made this Body united to a Spirit, and this divine Structure of Senses and Members, to serve as an Instrument for two Uses which are essential to Humane Society.

The first of these two Uses is to join the Mind and Heart of one Man to another, which is the natural Consequence of the Union of Soul and Body. For by the Mediation of the Senses united to the Mind, and by the Impressions the Mind makes upon the Senses, and the Senses upon the Mind, Men communicate their Thoughts and Sentiments to one another: And thus the Body is at once the Instrument and Image of the Mind and Heart, which are the Image of God.

The second Use of the Body is, that by it Men apply themselves to all these several kinds of Labour, which God has made necessary for supplying all their Wants; and upon the Account of this Labour, God has given us Senses and Members: And although 'tis true, that the Works wherein Men now are employ'd, are a Punishment to them inflicted by God, and that God has not given Man a Body fitted for Labour, that his Labour might be a Punishment to him; yet 'tis certain that Man is so naturally design'd for Labour, that he was commanded to work even in the State of Innocence. But one great Difference between the Work of Man in his primitive State, and that wherein he is employ'd at present, consists in this, That the Work of Man in his State of Innocence was an agreeable Employment, without Pain, Disgust, or Weariness, and that in his fallen State his Work is impos'd upon him as a Punishment. Thus the Law of Working is equally essential to Humane Nature in both States: And this Law is also a natural Consequence from the

two

* And the Lord God put him into the Garden of Eden, to dress it, and to keep it. Gen. ii. 15.

• In the sweat of thy face shalt thou eat bread. Gen. iii. 19.

two primary Laws aforementioned; which by engaging Men to enter into Society, oblige them to some Work, as being the Bond which ties them together; and appoint to each particular Person his proper Work, that by their several Ways of Working, the different Employments and Conditions of Men, who are to compose the Society, may be distinguish'd.

III.
Man design'd
for Society by
two kinds of
Obligations.

Thus God having design'd Men for Society, has created them in such a mutual Dependence upon one another, as obliged them to enter into it; and since the general Ties among all Men, whether by their Nature or their Designation to the same End under the same Laws, are common to the whole Race of Mankind, and do not found any particular Relation or Obligation to one Man more than another; he has added to these general Ties some other particular Bonds and Obligations, by which some Men are more closely united together, and each of them is effectually determin'd to perform to his Relative those Duties of Love, which he cannot practise to all the rest of Mankind: So that these Obligations are to each of them as it were particular Laws, which set forth to him the Duties of the second primary Law, and consequently regulate his Behaviour. For the Duties of one Man to another, are nothing else but the Effects of that sincere Love which every Man owes to all others, according to the Engagements he stands in to them.

These particular Obligations are of two Kinds. The first is, of those which arise from natural Relations, as of Marriage between a Man and a Woman, and of Birth between Parents and Children: And this Kind includes in it also the Obligations of Kindred and Affinity, which are the Consequents of Birth and Marriage.

The second Kind includes all other Sorts of Obligations which bring any Persons nearer to one another, and are founded either upon the various Ways of Intercourse between Man and Man, by their Labour, Industry, and all kind of Offices, Services, and other Assistances; or upon the Use of such Things as are afforded by one to another: Of which Nature are all the different Uses of Arts, Employments, and Professions of any kind, and every thing which can tie one Man to another, either by free Gifts, or by Commerce.

By these two Kinds of Obligations God has founded the Order of Humane Society, to tie them up to the Observance of the second primary Law. And as he signifies in each Obligation what he prescribes to those who lie under it; so by the different Characters of these Obligations, the Foundations of the several Rules are discern'd, which Justice and Equity requires of each Person according to the Circumstances of their Conditions.

CHAP. III.

Of the first Kind of Obligations.

I.
The natural
Obligations of
Marriage, and
of Birth.

THE Obligation that is founded upon Marriage between a Man and a Woman, and that which is founded upon Birth between them and their Children, constitute a private Society in each Family,

ly, wherein God ties these Persons more straitly together, that he may engage them to the continual Practice of divers Offices of mutual Love. Upon this Account it was, that God did not create all Men as he did the first, but he would have them to spring from the Union he appointed between the two Sexes in Marriage, and to be born into the World in a State subject to a thousand Wants, wherein they should for a long time stand in need of the Care and Assistance of these two Sexes: And from the Manner wherein God appointed these two Relations of Marriage and Birth, we must discover the Foundations of those Laws which concern them.

To form the Union between Man and Woman, and institute Marriage, which was to be at once the Source of the Multiplication, and of the Union of Mankind; and to give that Union such Foundations as were proportionable to the Characters of that Love which was to be the Cement of it; God at the first framed Man alone^r, and then out of him made a second Sex, and formed the Woman of one of his Ribs^u, to denote by the Unity of their Original, that they two make only one complete Being; wherein the Woman is taken out of the Man, and given to him again from the Hand of God^w, as a Companion, and a Help meet for him^x, and made out of him^y. Thus he has ty'd them together by an Union so close and so sacred, that 'tis said of it, God himself has join'd them together^z, and hath made them two to be one Flesh^a: The Man he made the Head of this complete Being^b, and hath established their Union, by forbidding any to put asunder, what he himself hath join'd together^c.

II.
The Divine Institution of Marriage, and divers Principles of Laws which depend upon it.

These are the mysterious Ways whereby God has establish'd the Obligations of Marriage, which are the Foundation not only of the Laws which regulate all the Duties of Husband and Wife, but also of the Laws of the Church, and of the Civil Laws concerning Marriage, and of such Matters as depend upon them, or have Relation to it.

Thus the Band of Matrimony being fram'd by the Hand of God, it ought to be celebrated after such a Manner as becomes the Sacredness of its Divine Institution; from whence it naturally follows, That Chastity should be preserved both before and after Marriage, That there should be a reciprocal Choice of the Persons engaging, That it should be made with the Consent of Parents, who in many

D

Respects

^r And the Lord God formed man of the dust of the ground. Gen. ii. 7.

^u And he took one of his ribs, and closed up the flesh instead thereof. Gen. ii. 21.

^w And the rib which the Lord God had taken from man made he a woman, and brought her to the man. Ver. 22.

^x And the Lord God said, It is not good that the man should be alone, I will make him an help meet for him. Gen. ii. 18.

^y This is now bone of my bones, and flesh of my flesh, she shall be called woman, because she was taken out of man. Gen. ii. 23.

^z What God hath joined together, let not man put asunder. Mat. xix. 6.

^a And they shall be one flesh. Gen. ii. 24. And they twain shall be one flesh. Mat. xix. 5. Eph. v. 31. Mark x. 8.

^b The head of the woman is the man. 1 Cor. xi. 3. Wives submit yourselves to your own husbands as unto the Lord, for the husband is the head of the wife, as Christ is the head of the church. Eph. v. 22, 23. And thy desire shall be to thy husband, and he shall rule over thee. Gen. iii. 16. 1 Cor. xiv. 34.

^c What God hath joined together, let not Man put asunder. Mat. xix. 6.

Respects hold the Place of God, and that it should be celebrated by the Ministry of the Church, where this Union is to receive the Benefits of that Blessing which God has pronounc'd upon his own Institution.

Thus the Husband and Wife being given to one another by the Hand of God, which unites them into one complete Being that cannot be parted, a Marriage can never be dissolv'd, which has once been lawfully contracted.

Thus the Union of Persons in Marriage, is the Foundation of that Civil Society whereby they are join'd together in the common Use of their Goods, and of all Things else.

Thus the Husband being by Divine Appointment the Head of his Wife, he has over her a Power proportion'd to the Manner of their Union; and this Power is the Foundation of that Authority which the Civil Laws give to the Husband, and of the Effects of that Authority in such Matters wherein it is exercised.

Thus Marriage being instituted for the Multiplication of Mankind, by the Union of a Man and a Woman, ty'd after the Manner that God has united them, every Conjunction of them except in Marriage is unlawful, and can only produce an illegitimate Offspring. And this Truth is the Foundation of the Laws of Religion and Policy, against unlawful Conjunctions: And of such Laws as regulate the Condition of Infants which are born by it.

The Band of Matrimony, which unites the two Sexes, is attended with that of Birth, whereby the Children born of that Marriage are ty'd to the Husband and Wife.

III.
The Tye of
Birth, and the
Principles of
the Laws
which are con-
sequent upon
it.

To make this Tye God has ordain'd that Man should receive his Life from his Parents, in the Bosom of a Mother: That his Birth should be the Fruit of the Pains and Labour of this Mother; that he should be born incapable of preserving that Life upon which he enters; that he should continue a long Time in a State of Weakness, and stand in Need of the Care and Assistance of his Parents, for his Subsistence and Education. And since by this Birth God hath contriv'd that mutual Love, which unites so closely, him who by begetting his like gives Life, and him that receives it, he hath made the Love of Parents of such a Nature as is suitable to the Condition of Infants at their Birth, and to all the Wants which are consequent upon this Life they have given them, that by this Love he might tye them to the Duties of Education, Instruction, and all other good Offices: And he hath made the Love of Children of such a Nature as is suited to their Duty of Dependence, of Obedience and Acknowledgment, and to all other Offices which they are obliged to by the Benefit of that Life, which they hold so of their Parents of whom God has order'd them to be born, that as he informs us, without them they would not have been^d; which obliges them to render to their Parents all Manner of Relief and Service in their Wants; and chiefly in the Time of their declining Age, and their other Weaknesses, Infirmities and Necessities, where-
by

^d Honour thy father with thy whole heart, and forget not the sorrows of thy mother: Remember that thou wast begot of them; and how canst thou recompense them the things they have done for thee! Ecclus. vii. 27, 28.

by the Children may recompense their Parents with such good Offices as correspond to the first Benefits they received from them.

This Way of Birth, which founds the Obligations between Parents and Children, is the Foundation of all their several Duties, the Extent whereof may be easily discern'd from the Nature of these different Obligations: And on the same Principles depends all that the Civil Laws have order'd as to the Effects of Paternal Power, and the mutual Duties of Parents towards Children, and Children towards Parents, so far as they are Matters of Policy: Such are the Rights which the Laws and Customs give to Fathers for the Conduct of their Children, for the Celebration of their Marriage, for the Administration and Enjoyment of their Goods; and as to the Disobedience of Children to their Parents, the Injustice of Parents or Children, who deny each other Food, and such-like Necessaries.

Upon this Method which God makes Use of for giving Life to Children by their Parents, the Laws are founded which pass over to Children the Estate of their Parents after their Death; because these Goods being given to Men for all the different Necessities of Life, which are consequent upon that Benefit, by the Order of Nature, Children, after the Death of their Parents, ought to receive their Goods as Accessories of that Life they receiv'd from them.

The Tye of Birth which unites the Fathers and Mothers to their Children, binds them also to those who are born and descended from their Children. And this Conjunction makes all the Descendants to be look'd upon as Children, and all their Ancestors in the Line ascending to be reckon'd as Fathers or Mothers.

We may observe from the different Properties of the Love which unites Husband and Wife, and of that which joins Parents and Children, that it is the Opposition of these different Properties, which is the Foundation of those Laws that make Marriage unlawful between Persons in the direct Line ascending, and the direct Line descending in all Degrees, and between those in the collateral Lines in some Degrees: And 'tis easy to perceive the Reasons of these Laws by reflecting only upon what we have just now remark'd about these different Properties, which we need not here enlarge upon.

Marriage and Birth which unite so closely Husband and Wife, Parents and Children, found also two other kinds of natural Relations, which are consequent upon them; the first is that of those in the collateral Line who are call'd Kindred; the second is that of those who are allied, call'd Affinity.

IV.
The Tye from
Kindred and
Affinity.

Kindred ties those collateral Degrees together, whose Birth had its Original from the same common Parent in the Line ascending. They are so call'd, because whereas Fathers and Sons are in a direct Line ascending or descending, these collateral Degrees are in another Line, but which at last center in one common Father in the direct Line. Some are on one Side of the direct Line, and some on the other, and the Foundation of their Relation and Consanguinity, is their common Union in the same Parents from whom their Birth is deriv'd.

This is not a proper Place for explaining the Degrees of Consanguinity, it is a Matter that may be treated of under the Title of Successions. It may suffice here, to remark that this Relation of Kindred is the Foundation of divers Laws, *viz.* of such as forbid Marriage

Marriage between those who are near a-kin, of such as entitle them to Successions and Guardianship, of such as relate to the Refusal of Judges, and the Exceptions against Witnesses, as being a-kin to the Parties, and such like other Laws.

Affinity is the Relation which arises between the Husband and all the Kindred of the Wife, and between the Wife and all the Kindred of the Husband. The Foundation of this Relation is the Union between the Husband and the Wife, which is so close and intimate, that those who are related by Kindred to one of the two, are consequently related to the other: And this Affinity makes the Husband look upon his Wife's Father and Mother as being a Father and Mother to himself, and her Brethren, Sisters, and near Kindred, as being in stead of Brethren, Sisters, and near Kindred to himself; and the Wife upon the same Account looks after the same Manner upon the Father and Mother, and all the Kindred of her Husband.

This Relation of Affinity is the Foundation of those Laws, which forbid Marriage between such as are allied in a direct Line, either descending or ascending, in all Degrees; and between those in the Collateral Line, within the Compass of certain Degrees: And also of the Laws which assign such Persons as are allied to be Guardians, of those which reject Judges and Witnesses, as being allied to the Parties, and of several other such-like Laws.

C H A P. IV.

Of the second Kind of Obligations.

I.
What are these
Obligations,
and how God
lays upon eve-
ry Man such
as are peculiar
to him.

SINCE the Obligations of Marriage and Birth, of Kindred and Affinity, are limited between certain Persons, and God has placed Men in Society, to unite them together by mutual Love, in such a Manner, that each Man should be disposed to shew to every other Man the Effects of this Love, as Occasions may require; therefore he hath made a second Kind of Obligations necessary, which ties all Sorts of Persons nearer together after a different Manner, and many times even those who are Strangers to one another^e.

To found this second Kind of Obligation, God has multiplied the Wants of Men, and made them necessary to one another for supplying all their Wants: And there are two Ways he makes use of to lay upon them such Kind of Obligations as he designs for them.

The first of these two Ways is the ranging of Persons in Society, wherein he has assigned each Person his own Place, so as to signify to him by his Situation the Relation he stands in to others, and what are the Duties peculiar to that Station in which he is placed; and every Man has his particular Post assign'd him, either by his Birth, or Education, or his Inclinations, or by the other Effects of that wise Conduct, which disposes of Mens Fortunes in the World. This first Way lays upon all Men general Obligations from their Condi-

^e Luke x. 33.

Conditions, Professions, and Employs, and places every Person in a certain State of Life, from which his particular Obligations are derived.

The second Way is the disposing of Events and the Conjunctions of Affairs, which determine every Man to some peculiar Obligations, according to the different Occasions and Circumstances he meets withal.

All these Sorts of Obligations are of two Kinds, either they are voluntary or involuntary: For Man being a free Agent, sometimes he voluntarily engages himself; and being a Creature depending upon the divine Government of the World, God lays some Obligations upon him without his own Choice. But whether the Obligations depend upon the Will, or whether they are independent upon it in their Original, a Man acts freely both in the one and the other: And all his Conduct constantly bears these two Characters, one of Dependence upon God, whose Appointments he is bound to comply with, and the other of his own free Will, which should incline him to do it. Thus all these Sorts of Obligations are suited both to the Nature of Man, and his dependent State in this Life.

Voluntary Obligations are of two Sorts; some are mutual between two or more Persons, who reciprocally bind and oblige one another by their own free Act; and others are made by the free Deed of one Person only, who engages himself to other Persons, without any Obligations from them to him.

These two Kinds of Obligations may be easily distinguish'd by some Examples. Thus we see, as to those Obligations that are voluntary and mutual, that Men do readily impart to one another their Industry and Labour, for supplying their various Necessities; and for carrying on several Ways of Commerce in all Things, they let, sell, exchange, and make among themselves all other Kinds of Agreement.

Thus, as to such Obligations as arise from the Act of one Person only, we see that he who makes himself Heir, obliges himself to all the Creditors; That he who undertakes the Management of an Affair for one that is absent without his Knowledge, makes himself accountable for all the Consequences of that Affair he takes in hand: And that in general, all those who voluntarily take upon them any Employment, oblige themselves to discharge all the Duties that belong to it.

Involuntary Obligations are such as God lays upon Men without their own Choice. Thus they who are chosen to the Offices, call'd Municipal, as of Mayor, Sheriff, Consul, or the like; and those to whom the Courts of Justice grant some Commissions, are obliged to execute them, and cannot be dispensed with, unless they have some reasonable Excuse. Thus he that is assign'd to be a Guardian, is obliged to supply the Place of a Father to the Orphan, who is put under his Care. Thus he whose Affair was managed in his Absence, and without his Knowledge, by a Friend who took care of it, is obliged to pay that Friend his reasonable Charges, and to ratify what he has done well in his Business. Thus he whose Goods were saved from Shipwreck, by unlading the Ship and throwing other Goods over-board, is obliged to bear a Share in the Loss of those Goods, proportionably to what was secured for him. Thus the State

II.
These Obligations are of two sorts, either they are such as are voluntary, or such as are independent on the Will.

III.
Voluntary Obligations.

IV.
Obligations independent on the Will.

of those Members of a Society, who have no Means, and are disabled from working for their Subsistence, lays an Obligation upon all others to shew them mutual Love, by imparting to them such good Things as they have a Right to. For every Man being a Member of the Society, has a Right to live in it, and what is necessary for those who have nothing, and cannot earn their Livelihood by their Labour, must consequently be in the Hands of others, and therefore they cannot without Injustice detain it from them. And 'tis upon the Account of this Obligation, that in publick Necessities private Persons are bound, even by forcible Means to relieve the Poor according to their Wants. Thus the State of those who suffer any Wrong, and lie under Oppression, obliges the Ministers of Justice to use their Power and Authority to protect them.

v.
The Observation of the second primary Law design'd in all these Obligations.

We see then that in all these Kinds of Obligations, and in all others that can be thought of, God did not form Man, nor place him in this World, but to bind him to the Exercise of mutual Love; and that all the different Duties which these Obligations prescribe, are nothing else but the several Effects which this Love should produce, according to the various Conjectures and Circumstances of Affairs. Thus in general the Rules which command us to give to every one what belongs to him, to do no Wrong to any body, to be always faithful and sincere in our Dealings, and the like, command us nothing but the Effects of mutual Love: For to love is to wish well and to do good, and no Man loves those to whom he does any Injury, nor, those to whom he is not faithful and sincere. More particularly, the Laws which enjoin a Guardian to take Care of the Person and Goods of a Minor, command him nothing but the Effects of that Love he ought to have for this Orphan. Thus the Rules of all the Duties of those who are in Offices, and are under any other Kind of Obligation, general or particular, prescribe them nothing but what the second primary Law requires, as may be easily discern'd by considering the particular Obligations.

And so true it is, that this Command of loving one another is the Principle of all the Rules relating to our Obligations, and that the Design of these Rules is nothing else but the Order of Love, which is reciprocally due, that in case it should so happen, for Instance, that a Man cannot give to another what is his, without violating this Order, this Duty is suspended until such Time as he can perform it according to that Design. Thus he who has a Sword from a Mad-Man, or any other, who demands it, while he is transported with Passion, ought not to restore it to him, until such Time as that Person be in a Condition to forbear the making an ill Use of it, for it would not be true Love to give it him in these Circumstances.

Thus the second Law commands to all Men mutual Love: For the Design of that Law is not to oblige every one, to have that Inclination for all others which proceeds from the Qualities that render him lovely; but the Love which it enjoins, consists in desiring and procuring to others their true Good as much as is possible for us. And since the Command does not depend upon the Merits of those we are to love, and no Person whatsoever is accepted by it, therefore it obliges us to love those who are less amiable, and even those who hate us. For the Law which they violate, is in

Force to us, and we ought to wish and procure their true Good; as well out of Hopes of reducing them to their Duty, as out of Fear of failing in our own.

My Design in making these Reflections is to shew, that since the second Law is the Principle and Design of all those which concern our Obligations to one another, it is not enough to know, as the most barbarous People do, That we must render to every one what belongs to him, That we must do no Injury to any body, That we must be sincere and faithful, and such-like other Rules; but we must consider the Design of these Rules, and the Source of their Truth in the second Law, that we may give them the whole Extent they ought to have. For it is often seen, that for want of this Principle, many Judges who consider these Rules but as politick Laws, without penetrating into the Design of them, which obliges to a more exact Justice, do not allow them their just Extent, and so they tolerate that Unfaithfulness and Injustice, which they would suppress, if the Design of the second Law were their Principle.

To these Remarks we must add as to what concerns Obligations, that Government is necessary to restrain every Man within his due Bounds. It was upon the Account of Government, that God establish'd the Authority of the higher Powers that are necessary for the maintaining of Society, as will appear in the tenth Chapter. And I shall here only remark as to Government, and the Occasion of these Obligations, that many of them arise from this Order of Government, as are between Princes and Subjects, betwixt those who are in Dignities and publick Offices and private Persons, and others also of a like Nature.

VI.
The Order of Government for keeping Men strictly to their Obligations.

It was necessary to give this general Idea of all these several Kinds of Obligations which we have hitherto discoursed of: For as it is by these Ties that God engages Men to all their different Duties, and that in each Obligation God has laid the Foundation of those Duties that depend upon it: So in these Sources we must discover the Principle and Design of the Laws, according to the Obligations to which they have Reference. We have seen in the Obligations of Marriage and of Birth the Principles of the Laws which relate to them, and we must discover in the other Obligations which we have just now explain'd, the Principles of the Laws peculiar to them.

VII.
The Obligations are the Foundations of the particular Laws which concern them.

They may be reduced to such as relate to the Civil Laws: And since the greatest part of the Matters in the Civil Law, are consequent upon the Obligations we have discoursed of in this Chapter, I shall in the next Chapter give an Account of some general Rules, which flow from the Nature of these Obligations, and are at the same time the Principles of particular Rules, as to some Matters which arise from the same Obligations.

CHAP.

^s Thou shalt not hate thy brother in thy heart. Lev. xix. 17. Thou shalt not avenge nor bear any grudge against the children of thy people. Ibid. 18. If thou meet thine enemy's ox or his ass going astray, thou shalt surely bring it back to him again. If thou see the ass of him that hateth thee lying under his burthen, and wouldest forbear to help him, thou shalt surely help with him. Exod. xxiii. 4, 5. If I have rewarded evil to him that was at peace with me, (yea I have deliver'd him that without cause is mine enemy.) Psal. vii. 4. If thine enemy hunger, give him meat; if he thirst, give him drink. Prov. xxv. 22. Rom. xii. 10. Matt. v. 44.

C H A P. V.

Of some general Rules which arise from the Obligations mention'd in the preceding Chapter, and which are so many Fountains of the Civil Laws.

THESE general Rules which I have just now mention'd, and which are deduc'd from all that has been said in the preceding Chapters, are here explain'd in so many Articles, as Consequences inferred from the Principles already laid down: From these Principles then it follows:

I. Rule.
Obligations
are instead of
Laws.

That all Men being Members of the Body of the Society, each of them ought to discharge the Duties of his Function, as the Post he is possess'd of in the Society, and his other Obligations require of him: From whence it follows, that every Man's Obligations are to him instead of Laws.

II. Rule.
Submission to
the Powers.

That each private Person being united to this Body of the Society, ought to undertake nothing which is contrary to the good Order of it: And this Principle includes the Obligation of Submission and Obedience to the Powers which God has establish'd for maintaining this Order ^g.

III. Rule.
To do nothing
in our private
Affairs contra-
ry to the pub-
lick Peace.

That the Obligation of every private Person, with respect to the Society whereof he is a Member, does not only oblige him to do nothing to others, contrary to the good Order of the Publick, but also to confine himself within the Bounds of his own Station, and to make no ill Use either of himself or of any thing that belongs to him; for he is to the Society, what a Member is to the Body natural: And therefore those who do no Injury to others, but fall into some Excess that is offensive to the Publick, whether in their own Persons, or as to their Goods, as they do who despair, who blaspheme, or who swear in common Discourse; or those who prodigally lavish away their Goods; and, in fine, all those who act contrary to good Manners, to Modesty or Chastity, in violation of the external good Order, are justly punish'd by the Civil Laws, according to the Quality of their Excess ^h.

IV. Rule.
To do no In-
jury to any
Body, and ren-
der to every
one his Dues.

That in all Obligations between Person and Person, whether voluntary or involuntary, which may be the Subject-matter of Civil Laws, every one ought mutually to perform what is required by the two Precepts included in the second primary Law; whereof one is, To do to others as we would they should do unto us ⁱ; the other is, Not to do to another what you would not he should do unto

^g Let every soul be subject to the higher Powers, for there is no power but of God. Rom. xiii. 1. Tit. iii. 1. 1 Pet. ii. 13. Wisd. vi. 4.

^h Abide in thy place. Ecclus. xi. 22. Let all things be done decently and in order. 1 Cor. xiv. 40. *Juris præcepta sunt hæc honestè vivere, &c.* l. 10. § 1. ff. de Just. & Jur. § 3. Instit. eodem. *Expedit enim reipublicæ ne suâ re quis male utatur.* § 2. Inst. de his qui sui vel al. jur. sunt.

ⁱ All things whatsoever you would that men should do unto you, do you even so unto them. Mat. vii. 12. And as you would that men should do unto you, do even so unto them likewise. Luke vi. 31.

unto you^k: Which two Precepts comprehend the Rule, of doing no Injury to any Body, and rendring to every one his Dues^l.

That in voluntary and mutual Obligations, those who treat should be sincere, in declaring to one another what they oblige themselves unto, and faithful in performing it^m, and to do all other Things which are consequent upon the Obligations they enter intoⁿ. Thus the Seller ought sincerely to declare the Qualities of the Thing he sells, he ought to keep it until he delivers it, and to warrant it after it is delivered.

V. Rule.
Sincerity and Faithfulness in our voluntary and mutual Contracts.

That involuntary Obligations are suited to the Nature and Consequences of the Obligations, whether it consist in doing or giving, or in any other Kind of Obligation^o. Thus the Guardian is obliged to govern the Person, and administer the Goods of an Orphan who is under his Care, and to do all Things else which this Government and Administration make necessary. Thus he who is call'd to a publick Office, though it be against his Will, ought to acquit himself well in it. Thus they who without any Compact happen to have any thing in common among them, as Coheirs and others, ought mutually to perform what their Obligations require.

VI. Rule.
Faithfulness in performing the Duty of our involuntary Obligations.

That in all Kinds of Obligations, whether voluntary or involuntary, all Unfaithfulness, Double-dealing, Deceit, Insincerity, and all other Ways of doing Hurt and Injury are forbidden^p.

VII. Rule.
All Fraud unlawful in any Kind of Obligations.

That since all private Persons compose together the Society, any thing that concerns the well ordering of it, obliges each Person to take care of it, and if he will not do it voluntarily, he may be compelled to it by the Authority of the Judges. Thus they who are nam'd in Cities and other Places, to the publick Offices of Sheriffs, Consuls, and such-like other Offices and Commissions, are compell'd to execute them^q. Thus those who are assign'd to a Guardianship, are obliged to accept of it, and discharge it^r. Thus they who have any thing to sell that's necessary for some Use, are forced to sell it when the Publick is concern'd^s. Thus Taxes and Imposts are justly exacted of private Persons for defraying the publick Expences^t.

VIII. Rule.
What Obligations the Courts of Law can force upon a Man.

F

That

^k Do that to no man which thou hatest. Tob. iv. 15.

^l Alterum non lædere, suum cuique tribuere. l. 10. § 1. ff. de Justitiâ & Jure. § 3. Instit. eodem.

^m That ye may be sincere. Phil. i. 10. Lying lips are an abomination to the Lord, but they that deal truly are his delight. Prov. xii. 22. Perform thy word, and deal faithfully with him, thy Neighbour. Eccus. xxix. 3.

ⁿ Alter alteri obligatur de eo, quod alterum alteri ex bono & æquo præstare oportet. l. 2. § ult. ff. de obl. & act.

^o Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, & præstandum. l. 3. ff. de obl. & act.

^p Let no man go beyond, and defraud his brother in any matter. 1 Theff. iv. 6. Quæ dolo malo facta esse dicuntur, si de his rebus alia actio non erit, & justa causa esse videbitur, judicium dabo. l. 1. § 1. ff. de dolo.

^q Paulus respondit, eum qui injunctum munus à Magistratibus suscipere supersedit, posse conveniri eo nomine propter damnum reipublicæ. l. 21. ff. ad municip.

^r Gerere atque administrare extra ordinem Tutor cogi solet. l. 1. ff. de adm. & per tut.

^s Vide l. 11. ff. de evict. in verb. Possessiones ex præcepto principali distractas. V. l. 12. ff. de relig. Possessiones quas pro Ecclesiis vel domibus Ecclesiarum parochialium, &c. See the Ordinance of Philip the Fair, of 1303.

^t Render unto Cæsar the things which are Cæsar's. Mat. xxii. 21. Tribute to whom tribute is due. Rom. xiii. 7.

IX. Rule.
All Kinds of
Compacts
should be free.

That since the voluntary Engagements between private Persons, ought to be suitable to their different Wants, which renders the Use of them necessary, all Persons capable of these Engagements, ought to be free to bind themselves by any Sort of Agreement, as they think good, and to vary it according to the Differences in Affairs of whatsoever Nature, and according to the infinite Diversity of Combinations, that arise from their Conjunctures and Circumstances^u: provided only that this Agreement have nothing contrary to the Rule that follows.

X. Rule.
All Obligations
that are contra-
ry to the Laws
and good Man-
ners, are un-
lawful.

That no Obligation is lawful but in proportion to its Agreement with the good Order of the Society; and that those which are contrary to it are unlawful and punishable according to the Degree of their Opposition. Thus the Employments which are contrary to this Order, are of a criminal Nature: Thus the Promises and Compacts which are contrary to the Laws, and to good Manners, oblige Men to nothing but the Penalties which those who have made them may deserve^w.

It appears by the particular Subject Matters of the Civil Laws what is the Use of all these Principles, and 'tis sufficient to set them down here as general Rules, on which an infinite Number of particular Rules depend.

I was not willing to mix with these Obligations hitherto discoursed of, another Kind of Bond which unites Men more closely than any of them, except those of Marriage and Birth: And that is the Bond of Friendship, which produces an infinite Number of good Effects in Society, both by the good Offices and Services which one Friend does to another, and by the Assistance which every Man receives, from the Persons who are allied to his Friends. But although Friendships make a long Chain, and Relations of vast Extent, and of great Use to humane Society; yet they ought not to be reckon'd among Obligations, because they are of a Nature distinguishable from them by these two Characters. One is, that there can be no Friendship where there is not mutual Love, whereas in Obligations the Love, which ought to be mutual, is not always so: The other is, That Friendships do not make any particular Kind of Obligation, but are the Consequents that proceed from it. Thus the Ties of Kindred and Affinity, of Offices, of Commerce, of Affairs and other Things, are the Occasions and Causes of Friendships: And they always suppose some other Obligation, which draws them nearer, who become Friends.

This Use of Friendships, which is so natural and necessary in Society, will not suffer us to pass them over in Silence; and the Difference of their Nature from that of Obligations, has prevail'd with us to distinguish them: And these Things will be the Subject of the next Chapter.

CHAP.

^u *Quid tam congruum fidei humane, quam quæ inter eos pacta sunt servare?* l. 1. ff. de pact. Ait prætor, *pacta conventa, quæ neque dolo malo, neque adversus leges, plebiscita, senatusconsulta, edicta Principum, neque quo fraus cuiquam fiat, facta erunt, servabo.* l. 1. § 7. ff. de pact.

^w *Pacta quæ contra leges constitutionesque, & contra bonos mores fiunt, nullam vim habere, indubitati juris est.* l. 6. c. de Pact. Such was the Obligation of that Prince, who to keep his word, put St. John the Baptist to death. Mat. xiv.

C H A P. VI.

Of the Nature of Friendships, and their Use in Society.

Friendship is an Union that is fram'd between two Persons by the mutual Love of one to the other. And as there are two Principles of loving, so there are two Kinds of Friendships. One is of those which are founded on the Nature and Design of the two primary Laws; and the other is of all the rest, which are not founded upon this Principle, and so can have no other Foundation but that of Self-love: For if Friendship be not founded on such an Union as engages Men to the Love of the Supreme Good, it can have no higher Motives than the temporal Goods of this Life, which can only be the Object of Self-love. Thus those who without loving the Supreme Good, appear to love their Friends, only for the Esteem they have of their Merit, or from a Desire of doing them good; and even those who give their Goods and their Lives for their Friends, still propose to themselves as the Fruit of their Friendship, either some Glory or some Pleasure, or some other Motive, which is their own peculiar Good, and is always their Aim in every thing their Friends receive from them: Whereas those who love one another for their Union to the Supreme Good, regard not their own peculiar Good, but a Good that is common to them both, and a Good whose Nature in this is different from all other Goods, that no Man can have it for himself, unless he desire it also for others, and sincerely endeavour as much as lies in him to assist him in obtaining it. Thus they who are united to their Friends by this Bond, do heartily promote the greatest Good and Advantage of those whom they love; and because they despise all other Goods but this only, which they love entirely, and with all their Heart, they are better dispos'd to give both their Goods and their Lives for their Friends, if there be a Necessity for it, than those can be who love others only from a Principle of Self-love.

I.
The Nature of
Friendships,
and their several
Kinds.

This Distinction of Friendships into those which are founded on the Design of the primary Laws, and those which proceed from Self-love is not so exact, that every Friendship, must be either entirely of the one or the other Sort: For among the small Number of those wherein the Design of the primary Laws is to be found, there are few of them so perfect, but Self-love has some Share in them; and there are also Friendships, wherein one of the Friends for his Part has no other Motive but Self-love, although the other is govern'd by a better Principle. And all these Friendships are adapted to the present State of humane Society, according to the different Dispositions of those who are united by them.

'Tis easy to perceive from the Nature of Friendship, which is a mutual Tie between two Persons, that there is a great deal of Difference between Friendship, and the Love commanded in the second Law. For the Duty of this Love is independent on the Love which should be return'd by another, whom we are oblig'd to love; and though that other do not love us at all, nay, though he do hate us, yet the Law requires us to love him; but Friendship, which cannot

II.
The Difference between
Friendship,
and the Love
commanded in
the second
Law.

cannot subsist without mutual Love, is not commanded to any particular Person: For that which depends upon two Persons, cannot be the Matter of a Command to one of the two only. And besides, since Friendship is only founded upon the Attractive which each Person finds in his Friend, no Body can be oblig'd to tie himself in Friendship where this Attractive is not to be found. And thus we see, that there is no Friendship but is founded on the Qualities which Friends love in one another, and is maintain'd by the good Offices and Services, the Benefits and other Advantages, wherein the Merit of each Friend consists, which allures and maintains the Esteem and Love of the other.

'Tis upon the account of this necessary Correspondence between Friends, that Friendships are not made but between such Persons as lie under some Engagements which link them to one another, and besides are of such Dispositions as are proper to unite them; such as the Equality of Conditions, the Agreement of Age, of Manners, of Inclinations and Sentiments, the mutual Inclination to love and serve, and such-like. And on the contrary we see that Friendships are difficultly, and very rarely made, and maintain'd between such Persons whom their Conditions, their Age and other Qualities distinguish after such a Manner, that there is no Place for the natural State of Friendship, for want of those Correspondences, and that Freedom which Friends ought to use with one another.

III.
The Command of the second Law leads a Man to Friendships.

But although it be true that Friendships are not commanded to any particular Person, yet they are a natural Consequent of the second Law. For this Law commanding every Man to love his Brother, includes the Command of mutual Love*. And when particular Engagements tie some Persons together, who are enliven'd with the Spirit of that Law, there arises at first between them an Union suited to the mutual Duties of the Engagements they lie under, and if any one of them finds in another such Qualities as are proper to unite them more closely, their Union becomes a Friendship.

IV.
Two Characters of Friendship, that it is mutual and free.

It appears by these Remarks upon the Nature of Friendships, that they have two essential Characters, one is, that they ought to be Reciprocal, and the other, that they ought to be Free. They ought to be reciprocal, because they cannot be made but by the mutual Love of two Persons: And they ought to be free, because no Man can be obliged to unite himself to those who have not the Qualities that are proper to found a Friendship.

The Consequences of these Characters.

From these two Characters of Friendship, that it ought to be reciprocal and free, it follows, that a Man is always at liberty not to engage in Friendships, and that he ought ever to shun those which may be of bad Consequence; and it follows also, that the most solid and closest Friendships may be weaken'd and destroy'd, if the Conduct of one of the Friends give Occasion to it; and not only that the Coldness and Rupture of Friends are not unlawful, but sometimes they are even necessary, and consequently just, with respect to that Friend who does not fail in any part of his Duty. Thus when one of the Friends violates the Laws of Friendship, either by some Unfaith-

* This is my commandment, that you love one another. John xv. 12.

Unfaithfulness, or by failing in some essential Duties, or by exacting Things unjust, the other is at liberty to look upon him no longer as a Friend, which in effect he ceases to be; and according to the Causes of the Coldness and Rupture, he may either break the Tie of Friendship, or dissolve it without a Rupture, provided only that he who has just Cause given him on the other's part, give no Occasion on his part, and that in this Change he preserve still, instead of Friendship, that other Kind of Love which nothing can dispense with.

All these Characters of Friendship, that a Man is free to make it, and free to break it, and that it cannot subsist but by the mutual Correspondence of two Friends, do plainly shew, that the Name of Friendship cannot be given to that Love which unites Husband and Wife, nor to that which ties Parents to their Children, and Children to their Parents. For these Relations produce a Love of another Nature, and very different from that of Friendship, and which is much stronger. And although it be true, that Man and Wife chuse one another, and freely engage in Marriage, yet the Knot being once tied, it becomes necessary, and cannot be dissolved.

V.
The Difference between Friendship and Conjugal Love.

We may also perceive what are the Differences which distinguish Friendship from the Love of Parents towards Children, and of Children toward their Parents. For besides that this Love is not reciprocal, while the Children are not yet capable of loving, there are other Characters which sufficiently shew, that it is of a Nature wholly different from that of Friendships: And although there is no Choice of the Persons in that Love, yet it has other Foundations more solid than the firmest and most intimate Friendships.

VI.
The Difference between Friendship and the Love of Parents and Children.

What we have observed of the Distinction between Friendships, and the Love which founds the Relations of Marriage and Birth, does not extend to the Love of Brethren, and other Kinsmen. For although Nature forms a Relation between them, without their own Choice, which naturally obliges them to mutual Love, this Obligation is not attended with Friendship, except when one finds in the other some Foundation for it. But when Proximity of Blood is found join'd with those other Qualities that make Men Friends, the Friendships of Brethren and other Kinsfolk, are much firmer than those of others.

We may see by these few general Remarks upon Friendships what is their Nature, and what are the Principles on which they depend. But since it is not the Subject-matter of any Civil Laws, we are not to enter into the particular Rules of the Duties of Friends; it is sufficient that we have remark'd as to Friendships, what Relation they have to the Order of Society; and we may perceive, that as Friendships arise from divers Relations and Ties which bring Men together, so they are at the same time the Sources of an infinite Number of good Offices and Services, which maintain the same Relations, and contribute a thousand Ways to the Order and Uses of Society, both by the Union of Friends among themselves, and by the Advantages which each Person may find in the Relations his Friends have to other Persons.

VII.
The Use of Friendships in Society.

To finish this Plan of Society, it remains that we should give an Idea of Successions, which perpetuate it, and of the Confusions which violate its good Order; and then we will see how God makes it to subsist in the present State of Mankind.

VIII.
A Transition to the following Chapters.

C H A P. VII.

Of Successions.

I Do not intend here to enter into the Detail of Successions, but only to give a View of them in the Plan of a Society, because Successions occasion a great Part of the Transactions in Society, and are one of the largest Subjects of the Civil Laws.

I.
The Necessity
of Successions
and their Use.

The Order of Successions is founded upon the Necessity of continuing and transmitting the State of a Society from Generation to Generation, which is done insensibly by the Succession of certain Persons in the room of those who die, whereby they enter upon all their Rights, Offices, Relations and Obligations, which can be pass'd over to the Successors.

II.
The Ways of
succeeding.

This is not a proper Place to describe the particular Ways of Successions, whether by the Order of Nature, or the Appointment of the Laws which give Successions to Sons or Fathers, and other Kindred; or by the last Will of those who die, and name their Heirs in it. In the Plan of Matters relating to Right, may be consider'd the distinct Ways of succeeding to an Inheritance, and the Order of Particulars as to the Matter of Successions.

III.
Successions
ought to be di-
stinguished
from Obliga-
tions.

I shall only remark here, that Successions ought to be distinguish'd from Obligations, which were the Subject of the preceding Chapters: For although Successions found an Obligation into which they enter who succeed to others, whereby they are bound to execute their Offices, discharge their Debts, and do such other Things as are consequent upon their Succession; yet Successions are not to be consider'd under the Notion of Obligations, but under the View of a Change, whereby the Goods, Rights, Offices, and Engagements of those who die, are pass'd over to their Successors: Which contains a great Variety of Matters of so vast an Extent that they make one of the two Parts of the Book of Civil Laws.

C H A P. VIII.

Of three Sorts of Things which disturb the Order of a Society.

I.
The Things
which disturb
the Order of
Society.

II.
Suits.

THERE are three Sorts of Things which disturb the Order of a Society, Suits, Crimes and Wars.

Suits are of two Sorts according to the two Ways wherein Men differ and attack one another. Those which concern only Men's Interest, are called *Civil Causes*; Those which arise from Complaints, Offences and Crimes, are called *Criminal Causes*. It may suffice to observe here in general, that each Kind of Cause is one of the Subjects of the Civil Laws, which regulate the Method of commencing, instructing and concluding a Cause, which is call'd the Order of Judicial Proceeding.

Crimes

Crimes and Offences are infinite, according as they differently respect the Honour, the Person, or his Goods. And the Punishment of Crimes is also a Subject of the Civil Laws, which have three different Aims in the Provision made to suppress them. One is the Correction of the Guilt, the other is the Reparation of the Mischief they have done, as much as is possible, and the third is the Restraint of wicked Men by the Example of the Punishment: And by these three Aims the Laws have proportion'd the Punishments to Crimes, and divers Offences.

III.
Crimes and
Offences.

Wars are an ordinary Consequence of the Differences which happen between the Sovereign Powers of two Nations, who being independent upon one another, and having no common Judges above them, do themselves Justice by Force of Arms, when they cannot or will not have Mediators to make Peace between them: For then they take the Events of War, which God appoints, to be instead of Laws and Decisions of their Differences. There is also another Sort of War, which is nothing else but the pure Effect of Violence, and of the ambitious Designs which one Prince or State has upon his Neighbours: And lastly, there are Wars which are nothing else but the Rebellions of Subjects against their Princes.

IV.
Wars.

Wars have their Laws in the *Jus Gentium*, and there are Consequents of War which are the Subject of Civil Laws.

Now for finishing this Plan of Society, it remains only that we should consider how it subsists in this present State of Mankind, wherein the Design of the prime Laws, which ought to be the only Bond of it, is so little regarded.

V.
A Transition
to the next
Chapter.*

C H A P. IX.

Of the State of Society after the Fall of Man, and how God makes it to subsist.

EVERY thing that is contrary to good Order in Society, is a natural Consequence from the Disobedience of Man to the first Law which commanded him to love God: For this Law being the Foundation of the second, which commands Men to love one another, Man could not break the first of these two Laws, without falling at the same Time into such a State as inclin'd him to break the second also, and consequently to disturb Society.

I.
The Disturb-
ances of So-
ciety are a
Consequence
of Man's Dis-
obedience to
the first Law.

The first Law was to unite Men in the Enjoyment of the sovereign Good, and in this Good they found two Perfections which were to make their common Happiness; whereof one is, that it could be possess'd by all; the other, that it could make the intire Happiness of each Man. But Man having broken the first Law, and forsaken his true Happiness, which was only to be found in God, he sought it among sensible good Things, in which he found two Defects opposite to these two Characters of the supreme Good; one is, that these Goods cannot be possess'd by all; and the other, that they can never make the Happiness of any one. And it is a natural Effect of the Love and Pursuit of such good Things as have these

I

two

two Defects, that they occasion Differences among those who greedily covet them. For since the vast Capacity of the Mind and Heart of Man being framed for the Enjoyment of an infinite Good, could not be fill'd with these finite Goods, which can neither belong to many, nor be sufficient for one to make him happy, it is certainly consequent from this State into which Man is fallen, that those who place their Happiness in the Enjoyment of Goods of this Nature, whenever they happen to clash in pursuit of the same Objects, are divided among themselves, and break through all Kinds of Ties and Obligations, according as the Love of the Good they pursue engages to act contrary to them.

II.
A disorderly
Love is the
Source of Disorders in a Society.

Thus Man having placed other Goods in the room of God, who was to be his only Good, and his chief Happiness, has made his supreme Good to consist in these seeming Goods on which he has fix'd his Love, and founded his Happiness, which is in effect to make a God of them ^y. And thus by departing from the only true Good, their wandering in pursuit of other Goods has divided them ^z.

It is therefore this disorderly Love which has disorder'd Society: For instead of that mutual Love which was to unite Men in the pursuit of their common Good; we see now another Love wholly opposite to it, which generally prevails among Men, whose Character has justly procured it the Name of Self-love; because he in whom this Love reigns, seeks only after such Goods as he would make his own, and which he loves in others only so far as they may have Relation to himself.

The Venom of this Love which stupifies and dulls the Heart of Man, and takes from those who are possess'd with it, the View and Love of their true Good, bounding all their Aims and Desires by their own private Good, is as it were an universal Plague, and the Source of all the Mischiefs which overspread a Society: From whence it seems to follow, that Self-love by undermining the Foundations should destroy it; which obliges us to consider after what Manner God has supported it in such a Deluge of Evils as Self-love has produced.

III.
God has made
such Use of
Self-love,
which is the
Pest of Humane Society,
as contributes
to make it subsist.

'Tis certain that God would never have suffer'd Evil to happen in the World, but that he was able by his infinite Power and Wisdom, to bring Good out of it, and a much greater Good than the pure State of Good would have been without any Mixture of Evil. Religion informs us of the infinite Good which God has extracted from so great an Evil as the State to which Sin had reduced Man, and that the incomprehensible Remedy which God made use of to deliver him from it, has exalted him to a State more happy than he had before his Fall. But whereas God produced this Change from a good Cause, and it proceeded only from his own Good-will, we see that in the Government of Society, God makes use of so bad a Cause as Self-love, though it be directly contrary to that mutual Love which was to be the Foundation of Society, as a Means to make it subsist. For from this Principle of Division, he has made such a Band of Union,

^y With whose appearance being delighted, they thought them to be Gods. Wisd. xiii. 13.

^z From whence come wars and fightings among you? come they not hence, even of your lusts that war in your members? Ye lust and have not, ye kill and desire to have, and cannot obtain, ye fight and war, yet ye have not, because ye ask not. James iv. 1, 2.

Union, as ties Men together a thousand Ways, and occasions the greatest part of their Obligations. We may judge of this Use of Self-love in Society, and the Relation of such a Cause to such an Effect, by the Reflexions which any one may easily make upon the following Remark.

The Fall of Man was so far from setting him free from his Wants, that on the contrary it multiplied them, and so encreased the Necessity of Labour and Commerce, and consequently of mutual Obligations and Dependencies; for since no Man alone is sufficient for himself, the great Variety of Wants engaged Men in infinite Ways of mutual Correspondence, without which they could not live.

This State of Mankind induc'd those who are govern'd only by Self-love, to submit to Labour and Trade, and such Correspondences as their Wants made necessary. And that they may render themselves useful in Society, and preserve in it both their Reputation and their Interest, they keep their Promises, are faithful and sincere in their Bargains, so that Self-love complies with every thing, that it may serve it self of every thing: And it knows so well how to suit its several Actions to all its Aims, that it turns itself into all Shapes, and even counterfeits all Virtues; and every one may perceive in others, and if he would look inward, may see in himself these fine Ways that Self-love makes Use of to conceal itself, and cloak itself with the Appearance even of those Virtues which are most opposite to it.

We see then that this Self-love, which is the Root of all Evil in the present State of Society, is a Cause from which are drawn an infinite Number of good Effects, which being of their own Nature really good, should have had a better Principle: And thus that which is the Disease of Society may be look'd upon as a Remedy which God has made use of to maintain it; since although it produce only corrupt Fruits in those who are guided by it, yet it gives to Society all these Advantages.

All the other Causes which God makes use of for the Subsistence of Society, are different from Self-love, in this, That whereas Self-love is a real Evil, from whence God draws good Effects, the other Causes are the natural Foundations of Order, of which we may observe four different Kinds which comprehend every thing that contributes to maintain Society.

IV.
Four Foundations of the Order of Society in the present State.

The first is Religion, which uses the best Means in the World to govern Society by the Nature and Design of the primary Laws.

The second is the secret Government of God over Society in the whole Universe.

The third is the Authority which God has given to higher Powers.

The fourth is that Light of Reason which remain'd in Man after his Fall, which discovered to him the natural Rules of Equity. And by this last we must begin to ascend again to the rest.

This Light of Reason, which teaches all Men the common Rules of Justice and Equity, is to them instead of a Law^a, and remains in

V.
The natural Knowledge of Equity.

H

^a For when the Gentiles which have not the law, do by nature the things contained in the law, these having not a law, are a law unto themselves. Rom. ii. 14. *Ratio naturalis quasi Lex quædam tacita.* l. 7. ff. de bon. dam.

all their Minds in the midst of that Darkneſs wherewith they are overſpread by Self-love. Thus all Men have in their Minds the impreſſions of the Truth and Authority of theſe natural Laws: That we muſt do no Hurt to any body, That we muſt give to every one what is his Due, That we muſt be ſincere in our Contracts, faithful in performing our Promiſes, and other ſuch like Rules of Juſtice and Equity: For the Knowledge of theſe Rules is inſeparable from Reaſon, or rather Reaſon is nothing elſe but the Perception and Uſe of all theſe Rules.

And although this Light of Reaſon which gives a Sight of theſe Truths, even to thoſe that are ignorant of their firſt Principles, does not ſo far prevail with every one as to make it the Rule of his Behaviour, yet it has ſo great an Influence over all, that the moſt Unjuſt love Juſtice ſo much as to condemn and hate Injuſtice in others. And it being the Intereſt of every one, that others ſhould obſerve theſe Rules, the Multitude think it their Duty to reduce thoſe to Obedience who tranſgreſs them, and do hurt to others. And therefore we are of Opinion, that God has engraven on all Mens Minds this Kind of Knowledge and Love of Juſtice, without which Society could not be maintain'd. And by this Knowledge of natural Laws, the Nations which were ignorant of Religion, made their Society ſubſiſt.

VI.
The Govern-
ment of God
over a Society.

This Light of Reaſon which God has given to all Men, and theſe good Effects he has drawn from their Self-love, are the Cauſes whereby Men themſelves contribute to maintain Humane Society: But withal we muſt acknowledge that it has a Foundation more eſſential, and much more ſolid, which is the Government of God over Men, and that Order wherein he preſerves Society at all Times, and in all Places, by his infinite Power and Wiſdom.

'Tis by Virtue of this Almighty Power, that he embraces the Univerſe as a Drop of Water, or a Grain of Sand^b, and is preſent in every Part of it. 'Tis by his infinite Wiſdom that he diſpoſes and orders all Things ſweetly^c.

'Tis by his univerſal Providence over Mankind that he has divided the Earth among Men, and diſtinguiſhed the Nations, by the Diversity of Empires, Kingdoms, Republicks, and other States; and regulates both the Extent and Duration of them, by ſuch Events as occaſion their Riſe, Encreaſe, Decay, and Diſſolution: And that among all theſe Revolutions he ſtill founds and maintains Civil Society in each State, by the Diſtinctions he has made of Perſons to ſerve in all Employments and Places and by other Methods which are wholly in his Diſpoſal^d.

The ſame Providence for maintaining Society, has appointed two Sorts of Powers which are fit to reſtrain Men within the Bounds of their Obligations.

VII.
The Authori-
ty which God
has given to
higher Powers.

The firſt is that of Natural Powers, which reſpect Natural Obligations, ſuch as the Power which Marriage gives the Husband over the

^b Behold the nations are as the drop of a bucket, and are counted as the ſmall duſt of the balance. Iſa. xl. 15.

^c He reacheth from end to end ſtrongly, and diſpoſeth all things ſweetly. Wiſd. viii. 1.

^d He that giveth breath to the people. Iſa. xlii. 5.

the Wife^e, and that which Birth gives to Parents over their Children^f; but these Powers being limited to Families, and restrain'd to the ordering of these natural Obligations, it was necessary there should be another sort of Power of a more general and extensive Authority. And since Nature which distinguishes the Husband from the Wife, and Parents from Children, does not in like Manner distinguish other Men, but has made them equals, God has so distinguish'd some of them, as to give them another Kind of Power, whose Administration extends universally to all Sorts of Obligations, and to all the Concerns of Society. And this Power he has distributed differently, in Kingdoms, Common-wealths and other States, to Kings, Princes, and other Persons whom he hath advanc'd^h, by Birth, Election, and other Methods, wherein he ordains or permits those whom he has design'd for this Station to be promoted to it. For the Almighty Conduct of God always disposes of that Chain and Concatenation of Events which precede the Advancement of those whom he calls to Government. Thus he always places them in this high Station; from him alone they hold all the Power and Authority they have, and the Administration of his Justice is committed to themⁱ. And as it is God himself whom they represent in this high Station, which raises them so far above others; So he would have them look'd upon as Lieutenants in their Office: And for this Reason he himself calls them *Gods*, to whom he has communicated this Right of governing and judging Men, because it is a Right that is not natural to any but himself^k.

For the Exercise of this Power, God has put the Supreme Authority in the Hands of those who hold the highest Place in the Government, and has given them several other Rights that are necessary, for maintaining the Order of Society according to the Laws which he has establish'd^l.

Thus for maintaining this Order he has given them the Right of making Laws^m, and such Regulations as are necessary for the publick Welfare, according to different Times and Places; and also the Power of enacting Penalties for Crimesⁿ.

Upon the same Account of maintaining Order, he has given them the Right of communicating and dividing among divers Persons the Exercise

^e The head of the woman is the man. Eph. v. 22. 1 Cor. xi. 3. He shall rule over thee, Gen. iii. 16.

^f Sons obey your parents in the Lord. Eph. vi. 1. He that fears the Lord, honours his parents, and as Lords he shall serve them who begat him. Eccclus. iii. 8.

^g Quod ad jus naturale attinet, omnes homines aequales sunt. l. 32. ff. de reg. Jur.

^h Over every nation he set a ruler. Eccclus. xvii. 4.

ⁱ Power is given you from the Lord. Wisd. vi. 4. There is no Power but of God. Rom. xiv. 1. Joh. xix. 11. For he is the minister of God. Rom. xiii. 4. The people come unto me to enquire of God. Exod. xviii. 15. Take heed what ye do, for ye judge not for man but for the Lord. 2 Chron. xix. 6.

^k Thou shalt not revile the Gods. Exod. xxii. 8. I have said ye are Gods. Psal. lxxxix. 6. Joh. x. 35. Exod. xxii. 8.

^l The ministers of his kingdom. Wisd. vi. 5. That he may learn to fear the Lord his God, to keep all the words of this Law, and these statutes to do them. Deut. xvii. 19.

^m By me kings reign, and princes decree justice. Prov. viii. 15.

ⁿ For he beareth not the Sword in vain: he is the minister of God to thee, a revenger to execute wrath upon him that doth evil. Rom. xiii. 4.

Exercise of that Authority, which they cannot manage alone in all particular Cases; and also the Power of appointing different Kinds of Magistrates, Judges, and Officers that are necessary for the Administration of Justice, and for all other Publick Offices ^o.

Upon the same account of Order, Sovereigns have the Power of Taxes according to their Necessities, for defraying the Expences of the Government at home, or defending the Nation abroad from the Invasions of Foreigners ^p.

For securing all these Ends of the Authority given to Temporal Powers, God has commanded all Men to be subject to them ^q.

VIII.
Religion.

Lastly, Religion should be look'd upon as the most natural Foundation of the Order of Society; and indeed it is the true Principle of all good Order, which ought to be observ'd in it. But there is this Difference between Religion and all the other Foundations of Society, that whereas others are common to all Places, the true Religion is not known, nor receiv'd but in some States; and even where it is known, it does not prevail over all to observe its Rules. But certainly in those Places where the true Religion is professed, the State of Society is most natural, and fittest to be maintain'd in good Order, by the Concurrence of Religion and Policy, and the Joint-administration of the Spiritual and Temporal Powers.

Seeing therefore the Spirit of Religion is the Foundation of all good Order in Society, and that it ought to subsist by the Union of Religion and Policy; 'tis a Matter of great Importance to consider, how Religion and Policy agree with one another, and how they are distinguish'd, for framing this Order; and what is the Ministration of Spiritual and Temporal Powers. And because this Matter is an essential part of the Plan of a Society, and has great Relation to the Civil Laws, it shall be the Subject of the next Chapter.

CHAP. X.

Of Religion and Policy, and of the Administration of Spiritual and Temporal Powers.

I.
Of Religion
and Policy, as
founded on di-
vine Appoint-
ment.

THERE is no doubt but Religion and Policy have one common Foundation, which is the Appointment of God; for a Prophet hath taught us, that it is he who is our Judge, our Law-giver, and our King, and that he also is the Saviour of Mankind ^r. Thus 'tis he who in the Spiritual Order of Religion, has appointed the

^o Thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness, and place such over them to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens. And Moses chose able men out of all Israel, and made them heads over the people. Exod. xviii. 21, 25.

^p Give unto Cæsar the things which are Cæsar's. Mat. xxii. 21. Tribute to whom tribute is due. Rom. xiii. 7.

^q Let every soul be subject to the higher powers. Rom. xiii. 1. 1 Pet. ii. 13. Put them in mind to be subject to principalities and powers. Tit. iii. 1.

^r The Lord is our judge, the Lord is our law-giver, the Lord is our king, he will save us. Isa. xxxiii. 21.

the Ministrations of the Ecclesiastical Powers¹. Thus 'tis he, by whom, in the Temporal Order of Policy, Kings reign², and who gives to Sovereigns all the Power and Authority they have. From whence it follows, that Religion and Policy, having the same common Foundation of divine Institution, ought not only to agree among themselves, but mutually to support one another, after such a Manner, that private Persons may exactly and faithfully obey both the one and the other; and that those who are Ministers of these two Powers, may exercise them with such a Spirit, and by such Rules as to reconcile them; nay, 'tis certain that true Religion and good Policy do always perfectly agree.

'Tis very well known that the Design of Religion is to bring Men back to God by the Knowledge of the Truths it teaches, and withdraw them from the By-ways of Self-love, that so they may be united in the Observation of the two primary Laws, which being essential to Religion, do chiefly respect the Mind and Heart of a Man, whose good Dispositions should be the Principal of the external Order of Society. But since all Men have not this Spirit of Religion, and many of them so misbehave themselves, that they do even disturb this external Order; the Design of Policy is to maintain the publick Peace among all Men³, and to restrain them within the Bounds of Order, without any Dependence on their inward Disposition, by employing even Force and Penalties, as Occasion requires. And for these different Uses of Religion and Policy, God has instituted both in the one and the other, several Powers, whose Administrations are suitable to their Design and End.

II.
The Design of Religion.

III.
The Design of Policy.

Thus because Religion designs only to form good Dispositions in the inward Man, God has given to those Powers that are Ministers of it, a Spiritual Authority, whose only End is to govern the Mind and Heart, and to plant in them the Love of Justice, without using any Temporal Force to the outward Man⁴. But the Office of the Temporal Powers of Policy, whose Aim is only to regulate the external Order of Society, is exercised with such a Force as is necessary to restrain those who are not Lovers of Justice, but commit such Irregularities as disturb this Order⁵.

IV.
The Distinction between the Administration of the Spiritual and Temporal Powers.

Thus the Spiritual Powers instruct, exhort, bind and loose the inward Man, and discharge other Duties peculiar to their Office. And the Temporal Powers command and forbid the external Actions of Men, maintain every one in his Rights, dispossess Usurpers, chastise the Guilty, and punish Crimes, by inflicting such Pains and Penalties as are suited to preserve the publick Peace.

Thus the Spiritual Powers of Religion, whose Design requires that wicked Men should live that they may become good, have no other Ways of punishing Men, but by imposing such Penalties as are proper to reduce them to a Sense of their Transgressions: And the

I

Temporal

¹ As the Father sent me, so send I you, &c. John xx. 23. Mat. x. 16. Let a man so account of us, as of the ministers of Christ, and dispensers of the mysteries of God. 1 Cor. iv. 1.

² By me kings reign. Prov. viii. 15.

³ That we may lead quiet and peaceable lives. 1 Tim. ii. 2.

⁴ Reprove, rebuke, exhort with all long-suffering and doctrine. 2 Tim. iv. 2. Not that we have dominion over your faith. 2 Cor. i. 13.

⁵ He beareth not the sword in vain, for he is a minister of God, a revenger to execute wrath upon him that doth evil. Rom xiii. 4.

Temporal Powers which are to provide for the publick Peace, enact such Penalties as are proper to maintain it, and punish even with Death those Disturbers of publick Order who deserve it.

V.
Their Union
in maintaining
Order.

But these Differences between the Design of Religion and Policy, and between the Offices of the Spiritual and Temporal Powers, are no ways contrary to their Agreement; for the same Spiritual and Temporal Powers which are thus distinguish'd in the Exercise of their Office, agree in the common End of maintaining Order, and mutually assist one another to that Purpose. For it is a Law of Religion, and a Duty of those who are its Ministers, to exhort and command every one to obey the Temporal Powers, not only for fear of their Authority, and the Penalties they impose, but from a Sense of their indispensable Duty for Conscience-sake and the Love of Order ^y. And it is a Law of Temporal Policy, and the Duty of those who are entrusted with the Administration of it, to maintain the Exercise of Religion, and to employ the temporal Authority, and even force it self against those who disturb it. Thus these two Powers agree, and mutually support each other: And even then when the Design of the spiritual Office seems to demand something contrary to that of the temporal Policy, as when the Ministers of the Spiritual Power demand the Lives of some great Criminals, whom they condemn only to Penances, but the temporal Power condemns to Death; the Spiritual Administration of Religion, which requires Princes and Judges to do their Duty does not oblige them to use the same Clemency, but the temporal Judges may justly condemn them to Death, whom the Ecclesiastical Judges only do condemn to Prison, Fasting, and other Works of Penance.

VI.
Why these two
Administra-
tions are in dif-
ferent Hands.

'Tis upon the Account of these Differences between the Design of Religion and that of Policy, that God has parted the Administration of them, that so the Spirit of Religion, which should win the Hearts of Men by the Love of Justice, and the Contempt of Temporal Goods, might be inspir'd into them by other Ministers than the Temporal Powers, who are arm'd with the Terror of Penalties and Punishments to maintain external Order, and whose Administration chiefly respects the Use of Temporal Goods. And it is so essential to these two Administrations that they should be distinguished, and that the Spiritual Power should be divided from the Temporal, that although they were both naturally united in God, when he became visible to settle his Spiritual Kingdom, yet he abstain'd from the Exercise of his Power over Temporals: And all the Use he made of his Greatness and Power, was perfectly opposite to the Grandeur and State of a Temporal Kingdom.

For at the same Time, that he manifested the Divine Excellence of this Spiritual Kingdom by the enlightning Truths of his Doctrine ^z, by the Glory of his Miracles, by all the notable Circumstances of his coming ^a, which he had caus'd to be foretold by his Prophets, and

^y Let every soul be subject to the higher powers, for there is no power but of God, the powers that be, are ordained of God; whosoever therefore resisteth the power, resisteth the ordinance of God. Rom. xiii. 1. Wherefore we must needs be subject, not only for wrath, but also for conscience sake. Rom. xiii. 5. 1 Pet. ii. 13. Wisd. vi. 4.

^z I am the Light of the world. Joh. vi. 12. I have given thee for a light to the Gentiles. Isa. xlix. 6.

^a And all the People rejoiced for all the glorious things that were done by him. Luke xiii. 17.

and were to accompany the Reign of the Prince of Peace ^b, who was to bestow upon Men such good Things as did not divide them ^c; he assum'd none of the Ensigns of Temporal Power, he discharg'd no Duty belonging to it, nay he refus'd to make himself a Judge between two Brethren when one of them desir'd it of him ^d. And to shew that the Exercise of Temporal Power was to be parted from his Spiritual Rule, he left that Power entirely to Princes, and he himself chose to obey them. Thus at his Birth, he made the Circumstance of the Place where he was to be born, to depend upon his Obedience to a Law made by an Infidel Prince ^e. Thus during his Life, he taught others to render to Princes what was their Due; and he himself paid Tribute, although it was not due from him, for the Reason he gives at the same Time when he wrought a Miracle to get Money for the Payment of it ^f. And at the Time of his Death, he told him who exercised the Temporal Power, and did most unjustly abuse it, that he could not have that Power, except it had been given him of God ^g; and also signified unto him the Distinction between his Spiritual Kingdom, and the Temporal Dominion of Princes ^h.

'Tis true, that upon a certain Occasion he gave a visible Sign of his Dominion over Temporals, and a Dominion more absolute than that which he has entrusted with Princes, by working a Miracle, which was the Cause of some Loss to the Inhabitants of the Place where he wrought it ⁱ. But even this Miracle, which plainly discover'd his Almighty Power over Temporals, serv'd for a Proof, that he did refrain from all other Exercise of this Power, for no other Reason but only to signify the Distinction between the Spiritual Kingdom, he came to establish, and the Temporal Dominion he left to Princes.

Lastly, 'tis certain, that when he appointed the Ministers of his Spiritual Kingdom, and gave them the Rules of their Conduct, and chalk'd out the Extent of that Power he entrusted with them, he gave them no Power over Temporals. And it plainly appears, that none of them assum'd to himself the Exercise of any Part of the Temporal Power, but on the contrary, they were subject to it; and that at the same Time they discharged the Duties of their Spiritual Office, without any Regard to the Authority of the Temporal Powers who oppos'd them; yet they still taught, and they themselves paid Obedience to these Powers in such Things as belong'd to their Office.

From all that has been said it plainly follows, that the Exercise of the Spiritual Power is confin'd to that which concerns Spiritual Mat-
 ters ^k, and that it ought not to thrust itself upon Temporal Affairs; and also, that the Administration of the Temporal Power is bound-
 ed

VII.
 The two Ad-
 ministrations
 immediately
 depend upon
 God.

^b The Prince of Peace. Isa. ix. 6.

^c An High Priest of good things to come. Heb. ix. 11.

^d Luke xii. 13. ^e And ii. 1. ^f Mat. xvii. 23. ^g Joh. xix. 11. ^h Joh. xviii. 36.

ⁱ Mat. viii. 28. Mark v. Luke viii. 32.

^k Take thou unto thee Aaron thy brother, and his sons with him from among the children of Israel, that he may minister unto me in the priest's office. Exod. xxviii. 1. The chief priest is over you in all matters of the Lord. 2 Chron. xix. 11. Every high priest taken from among men is ordain'd for men in things pertaining to God. Heb. v. 1.

VIII.
The Authority of these two Powers over one another in the Execution of their several Offices.

IX.
An Example.

X.
Obedience to the Ministers of both Powers.

XI.
The Laws of the Spiritual Powers, wherein their Authority appears over the Temporal.

XII.
The Laws of the Temporal Powers which concern the Spiritual.

ed by Temporal Matters¹, and is not to meddle in Spiritual Affairs; that these two Offices are immediately appointed by God; and that those who exercise one of these two Powers, are subject to them who administer the other in such Things as depend upon it. And it appears also, that those who were acted by the Spirit of God have suited their Behaviour to the same Rules, and expressed the Submission due to both these Powers. Thus when God made choice of *Nathan* for the Spiritual Office of reproving *David*, the Temporal Power of that King did not hinder the Prophet from speaking to him with that Freedom which became the Authority of the Office he discharged; and this Prince also received the Reproof with Humility^m. But on the contrary, when the same Prophet would know the Intention of this Prince about the Choice of his Successor, whether he was for *Solomon* or *Adonijah*, he prostrated himself in great Humility, and begg'd of him to declare, which of the two he would make choice of to reign after himⁿ.

It were easy to discover from such-like Examples, how the Authority of Spiritual and Temporal Powers must be distinguish'd, and after what Manner they have been managed by those who have govern'd themselves by just Rules, and kept within the Bounds of their own Office, without invading another's. But 'tis sufficient to my present Purpose, to have given this general Idea of these two Administrations of Religion and Policy, whereby we may discern the Design and Use of both, and perceive the Principles which reconcile and distinguish them; and by all these Views we may judge after what Manner they contribute to maintain the Order of Society.

It may be thought that the Spiritual Powers have made Rules about Temporal Matters; such are those in the Canon Law about Contracts, Testaments, Prescriptions, Crimes, Judicial Proceedings, Rules of Right, and other such-like Matters: And that some Laws have also been made by the Temporal Powers, about such Matters as relate to Spiritual Affairs; such are some Constitutions of the first Christian Emperors, and some Ordinances of the *French King* about Matters of Faith and Ecclesiastical Discipline. But what is in the Canon Law concerning these Temporal Matters, cannot prove that the Ecclesiastical Powers have regulated Temporal Affairs: For on the contrary it appears, that at the beginning of the Canon Law, where the Distinction of Divine and Humane Laws is related, 'tis said, that Humane Laws are the Laws of Princes: That by these Laws Men's Rights are determin'd as to every thing they can possess; and that even the Revenues and Goods of the Church are preserv'd to it only by the Authority of these Laws, because God has given to Princes the Administration of the Government as to Temporals^o. Since therefore there can be nothing in the Canon Law which subverts this Rule, whatever is to be found in it as to Temporals, may be reconciled with this Principle; which is not difficult to do, if we reflect on the Use of the Rules which concern Temporals

¹ What belongs to the king's office. 2 Chron. xix. 11. ^m 2 Sam. xii. ⁿ 1 Kings i. 23.

^o Quo jure defendis villas Ecclesiæ? Divino, an humano? Divinum Jus in Scripturis divinis habemus: humanum in Legibus Regum. Unde quisque possidet quod possidet? nonne jure humano? Distinct. 8. can. 2. Jura autem humana jura Imperatorum sunt: quare? Quia ipsa jura humana per Imperatores & Rectores seculi Deus distribuit humano generi. Ibid.

porals in the Canon Law : For there we see for instance, that those which concern Judicial Proceedings relate to Ecclesiastical Jurisdiction : That those about Crimes impose Canonical Punishment, *i. e.* such Punishment as the Church enjoins for the Penance of Criminals : That the Rules about Contracts, Testaments, Prescriptions, and such-like Matters, consider them only so far as they have relation to Spirituals ; as upon the account of certain Ways of Commerce, which are forbidden to Ecclesiasticks, the Religion of an Oath, the Use of Agreements for Churches and particular Churchmen, and other such-like Views : That some of these Rules are nothing but the Answers of Popes upon Consultations : And lastly, that whatever may be there which purely concern Temporal Matters between Lay-men, they are only to be considered as Rules in the Territories of the Holy See, where the Popes are Temporal Princes ; and beyond this Compass they have no other Authority but what is given them by the Princes who admit the Use of them among their Subjects : As to which we may observe, that this Kind of Canonical Constitutions about Temporals, sufficiently discovers, that they naturally belong to the Temporal Authority, since they are for the most part extracted from the *Roman* Law, although 'tis true that some of them are contrary to it. But 'tis not necessary to treat of this here.

As to the Regulations which Princes may have made about Spiritual Matters, they have not extended their Authority to the Spiritual Administration which is reserved to the Ecclesiastical Powers, but have only employ'd their Temporal Authority to put the Laws of the Church in Execution, as to its external Order and Government. And these Ordinances which the *French* Kings call Politick Laws ^p, tend only to maintain this Order, and to restrain those who disturb it, by violating the Laws of the Church. And from these Ordinances it appears also, that the Kings order nothing but what belongs to their Power, and in them they style themselves Protectors, Defenders, Conservators, and Executors of what the Church teaches and ordains ^q.

XIII.
Kings are Protectors, Conservators, and Executors of the Laws of the Church.

There is yet another Difficulty which may be started, as to some Matters wherein it seems that the Temporal and Spiritual Jurisdiction clash with one another : As for instance, when the Temporal Jurisdiction takes cognizance of the Right of possessing Benefices, and when the Ecclesiastical Jurisdiction takes cognizance of Temporal Affairs between Ecclesiasticks. But as to the Right of possessing Benefices, it is a Matter of Temporal Jurisdiction, which only has the Power to join Force to Authority, that all Impediments may be removed, and Usurpers may be restrained : And as to the Right which Ecclesiastical Judges have to take cognizance of Temporal Matters in the Causes of Ecclesiasticks, it is a Privilege which Princes have granted to the Ecclesiastical Jurisdiction, in Favour of the Church.

XIV.
The Agreement of the Spiritual Jurisdiction with the Temporal.

The Design of all that has been said in this and the preceding Chapters, is to give a general Idea of the Plan of Humane Society upon the natural Foundations of that Order which God has appointed

XV.
A Transition to the next Chapter.

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^p Charles IX. January 17, 1651.

^q Francis I. in July, 1543.

ed in it; and to shew that the first Principles of that Order are the two prime Laws; that the Obligations which unite Men in Society, are consequent upon these two Laws, and that they are at once the Sources of all our Duties, and the Foundations of different Kinds of Laws; upon which Occasion I begun to descend from these general Principles, to those which are peculiar to the Civil Laws. It remains now, without entring into the Detail of these Laws, and their Subject-matters, that I should more closely consider the Nature and Design of Laws in general, and the Properties which distinguish their different Kinds, that so we may discover the Foundations of many Rules that are essential to the Knowledge and right Use of the Civil Laws: And this shall be the Subject of the two next Chapters.

C H A P. XI.

Of the Nature and Design of Laws, and their different Kinds.

I.
Two Sorts of
Laws: Laws
immutable, and
mutable Laws:
The Nature of
these Laws.

ALL the different Ideas which can be conceiv'd of the several Sorts of Laws, which are express'd by the Names of Laws Divine and Humane, Natural and Positive, of Religion and Policy, of the Law of Nations and the Civil Law, and by all the other Names which can be given them, may be reduc'd to two Kinds, which comprehend all Laws of whatsoever Nature, whereof one comprehends the Laws that are immutable, and the other the Laws that are mutable: For there is no Law but has one or other of these two Properties, which are well worth our Consideration, not only that we may apprehend this first general Distinction of the Laws into these two Kinds, which ought to precede the other Ways of Distinguishing them; but because these two Properties are most essential to the Nature of all Laws, and so the Knowledge of them is necessary, and of great Use in the Civil Laws.

The immutable Laws are so call'd because they are natural, and so just always and in all Cases, that no Authority can either alter or abolish them; and the mutable Laws are those which a lawful Authority may enact, change and abolish, as Occasion requires.

These immutable or natural Laws, are all such as by necessary Consequence are deduc'd from the two primary Laws, and are so essential to the Obligations which compose the Order of a Society, that they cannot be chang'd without undermining the Foundations of that Order: And the mutable Laws are all those which may be several Ways enacted, chang'd, and even abolish'd, without opposing the Design of the primary Laws, or shaking the Foundations of the Order of Society.

II.
An Example
of immutable
Laws.

Thus since it is a Consequence from the first Law, that we must obey the Higher Powers, because God has appointed them, and it is a Consequence from the second Law, that we must do Hurt to no body, and give to every one what is his Due, and all these Rules are essential to the Order of Society; for that Reason they are immutable Laws. And there is the same Reason of all the particular Rules which are essential to the same Order, and to the Obligations

tions which are deducible from the primary Laws. Thus it is a Rule essential to the Obligation of a Guardian, that he being instead of a Father to the Orphan who is under his Care, ought to look after the Behaviour and Goods of the Orphan: And so it is an immutable Law, that a Guardian is to take this Care upon him. Thus since it is a Rule essential to the Obligation of him that borrows any thing from another, that he ought to preserve it, 'tis also an immutable Law, that he ought to be answerable for any Damage it has suffer'd thro' his Neglect.

But the Laws about such Things as are left indifferent by the two prime Laws, and by the Obligations consequent upon them, are mutable Laws. Thus it is indifferent by these two Laws and the consequent Obligations, whether there be five, or six, or seven Witnesses to a Testament; whether a Prescription be obtain'd by twenty, thirty, or forty Years; whether the Value of Money be more or less; and so they are only mutable Laws, which regulate such Kind of Things, and this they do variously according as Time and Place require.

III.
An Example of
mutable Laws.

From this first Idea of the Nature of immutable Laws we may perceive that they have their Original from the primary Laws, of which they are only an Enlargement. Thus for Instance, these natural Rules of Equity which were above-mentioned, and other such-like, are nothing but what the Design of the second Law requires in each Obligation, as being essential and necessary to it.

IV.
The Origin of
immutable
Laws.

As to mutable Laws we may observe two different Causes, which render the Use of them necessary to Society, and have been the Sources of that infinite Multitude of mutable Laws which appear in the World.

V.
The Origin of
mutable Laws.

The first of these two Causes, is the Necessity of regulating certain Difficulties, which arise in the Application of immutable Laws; when these Difficulties are such that they cannot be provided against but by Laws, and the immutable Laws themselves do not at all regulate them. We may the better judge of these Difficulties by some Examples.

VI.
The first Cause
of mutable
Laws, the Dif-
ficulties which
arise from im-
mutable Laws.

The first Example to shew the Necessity of mutable Laws, shall be this. It is a natural immutable Law, that Fathers ought to leave their Goods to their Children after their Death; and there is another Law which is commonly plac'd among natural Laws, that he can dispose of his Goods by his last Will. If we allow to the first of these Laws an Extent without any Bounds, a Father can never dispose of any thing: And if the second be extended to an indefinite Liberty of disposing of all that he hath, as the ancient Roman Law did allow, then a Father may deprive his Children of any Part in his Inheritance, and give all his Goods to Strangers.

VII.
The first Ex-
ample.

By these Consequences so opposite to one another, which would follow from these two Laws being indefinitely extended, it appears to be necessary that some Bounds should be set to them both, to reconcile them. Indeed if all Men would govern themselves by Prudence, and by the Design of the two primary Laws, every one would be a fit Interpreter of what the Law requires of him, which would have Children succeed to their Fathers, and of what that Law also requires, which permits him to dispose of his Goods by Will; for then he could suit his Disposals to the State of his Goods and his

his Family, and to his Affection to his Children and other Persons, according as he may be oblig'd either to make them some Acknowledgment, or bestow upon them some liberal Gift. But because all Men are not govern'd by this Design of the primary Laws; nor by Prudence, and some abusing their Liberty of disposing of their goods; or even through Ignorance of their Estate and Affairs do prejudice their Children; therefore since it is not fit to leave an indefinite Liberty to those who can abuse it, and 'tis not possible to make for every one a particular Rule, it was necessary for reconciling these two Laws, and reducing them into such Rules as might be common to all Men, that a mutable Law should be made, which should abridge the Father's Liberty of disposing by Will to the Disadvantage of his Children, and secure to them a certain Portion of their Father's Goods, which they cannot be depriv'd of; and this Portion is now fix'd by a positive and alterable Law, and is call'd, *Portio Legitima*.

VIII.
Another Example.

Another Example is this: It is a natural and immutable Law, That he who has the Property of any thing, shall always enjoy that Property, until he voluntarily parts with it, or is deprived of it by some just and lawful Means: And it is also another natural immutable Law, That he who is possess'd of any thing, should not always be liable to the Danger of being disturb'd in his Possession, and that after he has possess'd a Thing for a long time, he shall be taken for the right Owner of it; because it is natural for Men to take so much care of their just Rights, as not to abandon them to others, and it is not to be presum'd without Proof, that a Possessor is an Usurper.

If we extend too far the first of these two Laws, That he who has the Property of any thing cannot be divested of it but by just Means; from hence it will follow, that whosoever can shew, that he or they from whom he has the Right, were once right Owners of an Inheritance, though it be above an Age since they were possess'd of it, shall re-enter upon the Inheritance, and divest the Possessor of it, unless, together with his long Possession, he can shew a Title, which destroy'd the Right of the first Owner. And if on the contrary we extend too far the Rule, which presumes Possessors to be the right Owners of what they possess, then the Property of all those will be lost who are not found in Possession.

From the contrary Tendency of these two Laws, it plainly appears, that one of them would restore the first Proprietor against an ancient Possessor, and the other would maintain a new Possessor against the right Owner, and that therefore it was necessary to regulate them by a positive Law, *viz.* That they who are not Possessors, and yet pretend to be Proprietors, should be bound to justify their Right, within a certain compass of Time; and that after this Time the Possessors, who had been no wise troubled, should be maintain'd in the Possession; and this is what is done by the positive Laws which regulate the Time of Prescriptions.

IX.
A third Example.

A third Example is this, It is a natural and immutable Law, that Persons who have not yet attain'd a sufficient Use of Reason for want of Age, Instruction, and Experience, cannot have the Management of their Goods and their Affairs; and that they may manage them, after they have attain'd sufficient Reason and Experience. But since Nature doth not furnish all Men at the same Age with this Suffi-

Sufficiency of Reason, which is necessary for the Management of their Affairs, and some have it sooner, others later; to render this Law of general Use, a positive Law was necessary, which should be a common Rule to all Men. Thus there are politick Laws which have left Fathers at liberty to determine, to what Age their Children should continue under the Government of a Tutor; and there are others which have fix'd the Minute of their Children's Age, under which they should be of full Age.

The last Example is this, It is a natural Law that he who buys any thing should not take Advantage from the Necessity of the Seller to purchase it at too low a Price*. But because it would be a thing of very bad Consequence in Trade, to break off all those Sales, where a thing was not sold for its just Price, therefore this Matter is thus regulated by a positive Law, That Bargains of Sale shall not be dissolved for the lowness of the Price, except in the Case where an Inheritance shall be sold at less than half its just Value. And the Injustice of these Purchasers who do less Hurt is connived at for the publick Good, unless there be other peculiar Circumstances which oblige to break off the Sale.

X.
A fourth Example.

In all these Examples, and such-like of mutable Laws which are deduced from those which are immutable, we must observe, that each of these mutable Laws have two Characters, which deserve to be well consider'd and distinguish'd, because they make as it were two Laws in one. For in these Laws, one part of what they enjoin is a natural Right, the other is of a positive Nature. Thus the Law which regulates the Portion of Children, includes in it these two Parts; one which ordains that Children should have a Share in the Inheritance of their Fathers, and this is an immutable Law; the other which adjusts this Portion to a Third, or a Half, more or less, and this is a positive Law; for it might have been two Thirds, or three Fourths, if the Lawgiver had thought fit to order it so.

XI.
Immutable Laws included in those that are mutable.

The second Cause of mutable Laws was the Invention of certain Usages which are thought to be useful in Society. Thus, for instance, Feudal Tenures were invented, Taxes, the payment of an Annual Rent for a certain Sum of Money, the Right of Redemption, Substitutions, and such-like other Usages, whose Establishment was arbitrary. And these Matters, which are the Inventions of Men, and may for that Reason be called arbitrary Matters, are regulated by a vast number of Laws of a positive Nature.

XII.
The second Cause of mutable Laws is the Usage of new Inventions.

Thus we see in Society the Use of these two Sorts of Matters: For there are many of them so natural, and so essential to our most common Necessities, that they have always been used in all Places; such as Exchanges, Letting to hire, Pledges, *Commodatums*, or *Mutuum*s, and many other Agreements; Guardianship, Succession, and many other Matters, together with the Use of Things invented. But here we must observe, that even these Matters, whereof Men have invented the Use, are always founded on some Principle of the well-ordering of Society. Thus, for instance, the Feudal Tenures are

L founded

* Under tutors and governours until the time appointed by the father. Gal. iv. 5.

* And if thou sell ought to thy neighbour, or buyest ought of thy neighbour's hand, ye shall not oppress one another. Lev. xxv. 14.

* Les Fiefs &
Les Arriere
Fiefs.

founded not only upon the general Liberty of making all Kind of Agreements, but also on the publick Benefit that arises from obliging those to whom these * Tenures are granted, and their Successors, to serve the Prince in the Time of War.

Thus Substitutions are founded on the general Liberty every one has to dispose of his own Goods, the Prospect of preserving the Goods in the Family, the Usefulness of taking from certain Heirs or Legatees the Liberty of disposing of them, because they may make a bad Use of it, and upon other Motives of the like Nature.

XIII.
There are mu-
table Laws a-
bout things na-
tural, and na-
tural Laws a-
bout Inven-
tions.

XIV.
Examples.

XV.
Few positive
Laws about
things natural.

XVI.
Many positive
Laws about
things arbitra-
ry.

XVII.
Two Sorts of
mutable Laws,
those which
flow from na-
tural Laws,
and those that
regulate In-
ventions.

XVIII.
Four Sorts of
Books which
comprehend
the positive
Laws we ob-
serve, the Ro-
man Law, Ca-
non-Law, E-
dicts and Cu-
stoms.

We must observe also, as to these Matters of Invention, that although they may seem to require only mutable Laws for their Regulation, yet there are many immutable Laws about them; as on the other Hand we see, that the other Matters which are called natural, are not only regulated by natural and immutable Laws, but also by such as are positive. Thus it is an immutable Law in the Matter of Fiefs, that the Conditions ought to be kept which are stipulated by the Title of their Grant. Thus in the Matter of Guardianship which is of natural Right, the Number of Children who are exempt from this Office is regulated by a positive Law. By these Examples then we see, and by others which have been already observ'd, that in all Matters, both natural and others, there is a Mixture of Laws immutable and mutable; but with this Difference, that in natural Matters there are but few positive Laws, but the greatest Part of Laws about them are immutable; and on the contrary there are an infinite Number of positive Laws about Matters of Invention. Thus we see in the *Roman* Law, that as the greatest Part of the Subjects there, which are in Use among us, are natural; so the Rules about them are almost all natural Laws: and that on the contrary, as the greater Part of our Customs are about Matters indifferent, so the greater Part of the Rules about them are mutable, and different in several Places. And this we see also in the indifferent Matters which are regulated by Edicts, that almost all their Rules are also of a positive Nature.

Mutable Laws then are of two Sorts, according to the two Causes on which they are founded. The first is, of those mutable Laws, which are Deductions from the natural Laws; such as those which regulate the Portion of Children, the Age of Majority, and the like: And the second is, of those which have been devis'd for regulating indifferent Matters; such are the Laws which regulate the Degrees of Substitution, the Rights of Redemption in Fiefs, &c.

All positive Laws of these two Kinds, are contain'd in four Sorts of Books, that we make use of in *France*, which are the Books of *Roman* Law, Canon-Law, Edicts, and Customs. Hence we have Occasion to distinguish upon another Account four Sorts of positive Laws, which are made use of in this Kingdom.

The first contains some positive Rules of the *Roman* Law which we have received, and authorized by the common Use of them among us; as, for Instance, that Law which was above-mention'd, of the Rescission of Sales for the Damage of more than half the just Value; the Laws which regulate the Forms of Testaments, the Time of Prescriptions, and others which are received either in the whole Kingdom, or some Provinces only.

The second Sort contains the positive Rules of the Canon Law which have been received by the common Use of them among us. Such are many Rules about Beneficiary and other Ecclesiastical Matters, and also about some Matters of the Civil Law.

The third Sort contains the positive Laws which are enacted by the Edicts of our Kings. Such are these which regulate the Rights of Dominion, the Punishment of Crimes, the Judicial Proceedings, and many other Matters of divers Natures.

The fourth Sort of positive Laws are those which are called Customs, which are found in the greatest Part of the Provinces, and regulate divers Matters. Such are the Feudal Tenures, the Community of Goods between Husband and Wife, Dowries, Childrens Portions, the Right of Redemption by one of the Family, the Right of redeeming the Feudal Tenure, and many others. And all these Customs are so many positive Laws which are different about the same Matters in divers Places. And because these Customs were a Kind of Laws which were not written, and were preserv'd only by the Use of them, which was oftentimes uncertain, therefore our Kings have caus'd the Customs which obtain in several Places to be collected together, and reduc'd into Writing in each Province, and have given them the Authority of Laws and Rules.

We have then in *France*, as there is every-where else, the Use of natural Laws and positive Laws; but with this Difference between these two Sorts of Laws, that all positive Laws we have, are contain'd in the Edicts and Customs, and the positive Rules of the *Roman* and Canon-Law, which we observe as Customs; all which Laws have a fix'd and determinate Authority: But as to natural Laws, because we have not the Particulars of them any-where but in the Books of the *Roman* Law, and there they are not rang'd in good Order, but mingled with many other Laws, which are neither natural, nor in use among us; their Authority is so weaken'd by this Mixture, that many either will not, or cannot discern that which is certainly just and natural, from that which Reason and our Usage do not approve.

From this Distinction of natural and positive Laws and the Observations that have been made upon these two Kinds of Laws, we may learn what are the different Characters of their Justice and Authority. And since it is the Justice and Authority of Laws which enforce them to our Reason, 'tis a Matter of Moment to consider and distinguish what is the Justice and Authority of Laws natural, and Laws positive.

The Justice of all Laws in general consists in the Influence they have upon the well-ordering of the Society whereof they are Rules. But there is this Difference between the Justice of natural Laws, and that of positive Laws, that natural Laws being essential to the two primary Laws, the Obligations consequent upon them are essentially just; and their Justice is always the same at all Times, and in all Places: But positive Laws being so far indifferent to these Foundations of good Order in Society, that they may be either chang'd or abolish'd without overturning it; the Justice of these consists in the particular Profit that is found by enacting them according as several Times and Places may require.

The Authority of all Laws in general consists in the divine Command to submit to and obey them; but as there is a Difference between

XIX.
The particular Rules of Natural Right, are no where collected together but in the *Roman* Law.

XX.
The Justice and Authority of all Laws; the Difference between that of natural Laws and positive Laws.

tween the Justice of natural Laws, and that of positive Laws, their Authority also is distinguish'd after such a Manner as is suitable to the Difference of their Justice.

Natural Laws being Justice it self, they have a natural Authority over our Reason; which is given us for that very End, that we may perceive Justice and Truth, and submit ourselves to them. But because all Men have not such clear Reason as to discern this Justice, or such upright Hearts as to obey it, Civil Policy has given them a Sanction independent on the Approbation of Men, by the Authority of Temporal Powers which enforce the Observation of them. But the Authority of positive Laws consists only in the Sanction of that Power which has the Right to make them, and in the Divine Command to obey them.

This Difference between the Justice and Authority of natural and positive Laws has this Effect, That whereas positive Laws being unknown to Men by Nature, they may be ignorant of them: Natural Laws being essentially just, and the natural Object of Reason, no Man can say, that he wants the light of Reason to instruct him in them: And therefore positive Laws are not in force until after Publication; but natural Laws are always in force though they be not publish'd. And since they can neither be changed nor abolished, but have their Authority from themselves, they always oblige Men, and none can pretend to be ignorant of them.

XXI.
Remarks upon
the Distinction
of immutable
Laws, which
neither admit
of Dispensation
nor Exception,
and those
that do admit
of them.

But although the natural and immutable Laws be essentially just, and can never be changed; yet we must take heed lest by this Idea of them we conceive, that they can admit of no Exception: For there are many immutable Laws which admit of Exceptions and Dispensations, though they still retain the Character of immutable Laws; as, on the contrary, there are many which will neither admit of Dispensation nor Exception.

This Difference, which distinguishes these two Sorts of Laws, is founded upon that Justice and Authority they have by their Influence upon the well-ordering of Society, and upon the Design of the two primary Laws: For if it so happen, that this Order and Design do require some of them to be limited either by Exceptions or Dispensations, then they admit of these Limitations; but if nothing can be changed without doing a Prejudice to this Order and Design, then they neither admit of Dispensation nor Exception. And even those which admit of them, do not therefore cease to be immutable; for it is always true, that they cannot be abolished, and that they are always certain and unrepealable Laws, although they be less general than others upon the account of these Exceptions and Dispensations. The Truth of this will plainly appear by some Examples.

Thus the Laws which enjoin Candor, Faithfulness, Sincerity, and which forbid Deceit, Fraud, and all Kinds of Surprise, are such Laws as can neither admit of Dispensation nor Exception. But on the contrary, the Law which forbids to Swear, admits of a Dispensation, when it is necessary to give Testimony to the Truth, by taking an Oath in a Court of Justice. And an Oath is also used to confirm the Obligation of those who enter upon Offices.

Thus the Law which requires us to perform our Agreements, admits of an Exception and Dispensation, in the Case of a Minor who is rashly engaged against his Interest.

Thus

Thus the Law which requires that the Seller should warrant what he sold, against the Claim of all others who may pretend a Right to it, admits of an Exception to this Warranty, by an express Agreement which discharges the Seller from it; or because he sells upon that account at a less Price, or for other Motives which render the Discharge of the Warranty just.

By these few Examples, 'tis easy to perceive, that these Exceptions and Dispensations are founded on the Nature and Design of the Laws; that they themselves are indeed other Laws, which do not at all alter the Character of the Laws to which they are Exceptions. And thus all Laws are reconciled to one another, and agree very well together, in that common Design which gives Justice to 'em all. For the Justice of every Law is limited within its own Bounds, and none of them can be extended to that which is otherwise order'd by another Law. And it will appear in all Kinds of Exceptions and Dispensations which are reasonable, that they are founded upon some Law. We must therefore consider the Laws which admit of Exceptions, as general Laws which regulate whatsoever commonly happens; and the Laws which make the Exceptions and Dispensations, as particular Rules which are proper to certain Cases; but both the one and the other are Laws and Rules equally just, according to their Use and Extent.

XXII.
The Foundation of Exceptions and Dispensations, and their Nature.

All these Reflections upon the Distinction of Laws immutable and positive, upon their Nature, their Justice, their Authority, sufficiently shew of what Importance it is to consider under all these Views, what is the Nature and Design of all these Laws; to discover the Character of immutable and positive Laws; to distinguish general Rules, and the Exceptions to them, and to make the other Distinctions which have been above-mention'd: And the same may be said of those which we are to treat of afterwards. Nevertheless it plainly appears by Experience, that although there be nothing more natural and real than the Foundations of all these Remarks; yet many Men appear to be either ignorant of them or to despise them, and do not so much as perceive the bare Difference between immutable and positive Laws; but look upon them all, without making a Difference, as having the same Nature, the same Justice, the same Authority, and the same Effect. For since they all together compose an infinite Miscellany of Rules about all Matters both natural and invented, and that they all have but one Name of Laws, they mistake in this Miscellany the Characters which distinguish them, and often take natural Rules for mere positive Laws; especially when these Rules have not the Evidence of the first Principles on which they depend, and are only remote Consequences from them: For not perceiving the Connexion of these Rules with their Principles, they do not see the Foundation of their Truth and Certainty.

XXIII.
The Importance of distinguishing the Properties and Design of Laws.

And since on the contrary positive Laws do always plainly appear, because they are written, and contain only the ordering of sensible Things, which for the most part are understood without reasoning, the Generality of Men do more easily receive the Impression of the Authority of positive Laws, than of these natural Rules, which do not so sensibly affect the Mind: And when there is a Want of this Impression (and of other Reflections necessary for the good Use of Laws, and to give every one its just Weight) in such Persons

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whose Judgment is not exact, and whose Memory is stuff'd with a great many particular Laws of all Sorts, there is Danger lest they have false Notions, and make wrong Applications of them; especially when they endeavour, as many do, to find Laws not agreeable to Reason, but to the Party which they have espoused, and mind nothing more, but how to give the Rules such an Extent as is suited to the Sense they have Occasion for.

We may easily find by Experience, how many Ways they mistake who thus confound the Laws, and by bare Reflexion on their different Sentiments in all Kinds of Questions, we may perceive, that none fall into any Error but for want of some or other of these Considerations, and that those who reason exactly, discover the Truth only by discerning the several Ways of distinguishing, chusing, and applying the Rules, even then when they do not reflect upon the natural Principles by which they discern them.

XXIV.
An Example
of the Consequence of distinguishing immutable Laws and those that are mutable.

But although it be easy to conceive, without the Help of any particular Example, of what Moment it is in the Application of Rules, to know their Nature, their Design and Use; and one would think, that of all Things necessary to be consider'd in Laws, there is nothing more easy to be perceiv'd, than their Distinction into such as are natural and immutable, and such as are positive and mutable, and that no Man can be deceiv'd for want of understanding this: Yet it may be worth the while to shew, by a remarkable Example, that there is many Times Danger of falling into Mistakes, by not discerning this, though it be easy to do it.

All those who have any Knowledge of the *Roman* Law, may remember that Law which was made from a Decision of *Papinian*, viz. That *Pupillary Substitution* excludes the Mother from her Share in the Inheritance, i. e. That if a Father substitute either a Kinsman or Stranger to his Son, to succeed him, in Case he dies before he comes to Man's Estate, this Substitute shall succeed him, even tho' the Mother of that Child should survive him; and by this Substitution she shall be depriv'd of her Share in the Inheritance.

This Decision is founded upon that Opinion of *Papinian*, that it is not the Son that deprives his Mother of her Share, but it is the Father who by the Liberty he has of disposing of it, passes it over to a Substitute.

If we examine this Decision, it will appear that the Question did arise from the apparent Opposition between a natural and a positive Law; and that a positive Law which permits the Father to make a Substitute, and extends that Liberty so far as to deprive the Mother of her Share, by passing over the Estate to that Substitute, is here prefer'd to a natural Law, which gives the Mother a Right to the Inheritance of her Son.

I do not here relate this Example to lessen the Esteem of so celebrated a Lawyer; but 'tis certain that he judg'd thus according to the Principles of the old *Roman* Law, that favour'd the Liberty of disposing of Estates by Will, which at first was so exorbitant, that the Fathers could disinherit their Children without any Cause. From this

¹ *Sed nec impuberis filii mater, inefficacium testamentum dicit, quia pater hoc ei fecit, & ita Papinianus respondit. l. 8. § 5. ff. de inoff. Test.*

this Principle it was that he invented that Subtlety, that it was not the Son that did this Wrong to his Mother, but it was the Father, *quia Pater hoc ei fecit.*

Thus this Decision being founded only upon that Principle of a boundless Liberty in disposing of Estates by Will, even to the depriving Children of their Share in them, which is a Principle that is neither natural, nor detain'd among us in *France*, we ought not to take a Subtlety for a Rule, which in favour of this Principle, deprives the Son of his Share in his Father's Estate, and the Mother of hers, in the Estate of her Son: For this Decision passes over all the Estate of the Testator to a Substitute, without permitting the Son to transmit any of it to his Heirs.

We may then rank this Nicety amongst the Number of many others in the *Roman Law* which we reject, because it is not receiv'd in *France* but as a written Law founded on Reason, and these Subtleties which are contrary to Natural Right are contrary to Reason. And though there needs not any Authority to prove, that Natural Right is to be preferr'd to these Subtleties; yet this Truth may be confirm'd by the Authority of the same Lawyer, who in another Question much like this has decided in Favour of the Natural Right. This was in another Substitution made by a Father to his Grandchild, in Case he should die before he was thirty Years old, for then he would have the Estate given to a Son of this Testator, Uncle to this Grandchild. The Case happen'd, he died before he was thirty Years old, but left Children behind him: And from this Circumstance *Papinian* decided in Favour of these Children, that the Substitution was annull'd, for in Equity it ought to be suppos'd, that the Testator had not sufficiently express'd himself, and tho' he had not mention'd the Case of his Grandson's having Children, yet he did not intend to deprive these Children of the Inheritance of their Father. Such another Conjecture in the first Case of *Pupillary Substitution*, should have made him presume, that the Father did not foresee that the Son should die before his Mother: And it was more easy for the Father in the second Case to foresee that his Grandchild might have Children before he was thirty Years old, than for another in the first Case of *Pupillary Substitution*, to foresee that the Grandchild should not survive his Mother: And therefore it might be presum'd, that he only intended to give the Estate to the Substitute, in Case the Mother should not be alive when the Son died.

As it is a Matter of great Importance, that we should not violate natural Equity by Subtleties and false Consequences drawn from positive Laws, as may be seen in this Example, and might be easily shewn in others; so we must take heed also lest under Pretence of preferring natural Laws to those that are positive, we do not extend a natural Law beyond the just Bounds which a positive Law has set to it, whereby it is reconcil'd with another natural Law, and both

XXV.

The Danger of violating a natural Law upon Pretence of preferring it to a positive Law,

^a Cum avus filium ac nepotem ex altero filio hæredes instituisset, à nepote petit ut si intra annum 30. moreretur hereditatem patris suo restitueret. Nepos liberos intra annum supra scriptam, vita decessit. Fideicommissi conditionem, conjectura pietatis, respondi defecisse, quod minus scriptum, quam dictum fuerat inveniretur. l. 102. ff. de condit. & demonstr.

XXVI.
An Example.

both the one and the other have their just Effect; and so, lest we violate another natural Law, while we think we are concern'd only with a positive Law. Thus, for Instance, it is a natural Law, that he who has been the Cause of any Damage, should make Reparation: But if we should allow this Law such an Extent, as would oblige the Debtor who should not pay at the Day prefix'd, to repair all the Damage the Creditor should suffer for want of his Payment; as if an Estate had been seiz'd and sold, or if his House had fallen down, because he had not that Silver, which he would have employ'd to repair it; such an Application of this just and natural Law, which obliges any one to repair the Damage he has been the Cause of, would be unjust, because it would be contrary to a positive Law, which regulates all the Damages to which a Debtor can be obliged for want of Payment, by the Reparation which is call'd *Interest*, and is fix'd to a certain Proportion of the Sum due, being at present the Twentieth part; and by violating this Law, one would infringe two natural Laws, which are the Foundation of it: One is, That Men are not answerable for unforeseen Events, which are rather the Effects of divine Providence and Chance, than Consequences that can be reasonably imputed to them: And the other is, That the infinite Diversity of different Damages, which Creditors suffer when they are not paid, is regulated by one uniform Reparation which is common to all the Cases that have the same common Cause of want of Payment at the Day appointed, without distinguishing the Events which produce different Kinds of Losses. For besides, that the Difference of Losses is the Effect of different Chances, for which no Man ought to be accountable; the Diversity of Reparations would be the Source of as many Suits from the Creditors, which they would pretend to distinguish by the Quality of the Loss that the want of Payment had caused.

XXVII.
The Discernment of the Design of Laws necessary for deciding Questions.

We see again in this Example, as we have already seen in others, which have been related to shew the Necessity of positive Laws, that there are such Difficulties as make it necessary to fix a general Regulation by a positive Law. But there are an infinite Number of other Sorts of Difficulties, which arise daily in the Application of Laws to the Differences between particular Persons, wherein it is neither necessary nor possible to settle precise Rules; and the Decision of this Kind of Difficulties depends upon those who are to judge of them, which requires on the one hand an exact Judgment, and on the other a perfect Knowledge of the Principles and particular Rules, whereby they may judge of the apparent Opposition between the Rules, which occasion contrary Opinions, and create the Difficulty; and discern by the Design of these Rules, the Bounds and Extent that must be given them, and the Consequences that would follow from setting too narrow Bounds, or too large an Extent to one or the other. By these Considerations, and the other Principles of the Interpretation of Laws, which have been already mention'd, and shall be hereafter explain'd in their proper Places, one may make a just Application of the Rules.

XXVIII.
The Necessity of studying the natural Laws; the Causes of that Necessity.

What is observ'd of the Necessity of knowing the Detail of Laws, chiefly respects the natural Laws: For although it may seem that Reason teaches us the natural Laws, and it is more easy to understand them well, than the positive Laws which are naturally unknown; yet

yet it is as well more difficult, as of greater Importance, to know well the natural Laws than the positive: For whereas these are fewer, and require only a good Memory to learn them, the natural Laws which regulate Matters more common and more important, are far more numerous, and are properly the Object of our Understanding. Thus there are two Causes which render the diligent Study of these Laws necessary.

The first of these Causes is this, that these natural Rules being very numerous, their Diversity and Multitude hinders them from being all presented to the View of every Man; and no Man's Reason alone is sufficient to find them out, and apply them to all Occasions, as will appear by the bare reading of all these Rules in the Detail of Matters.

The second Cause of the Necessity of knowing well the natural Laws is this, that these Laws are the Foundations of all the Knowledge of Right; and 'tis always by Arguments drawn from natural Laws, that all Sorts of Questions are examin'd and resolv'd, whether they arise from the apparent Opposition of two natural Laws, or of a natural and a positive Law, or only from the Opposition of two positive Laws; for there arises an infinite Number of them of all these Sorts: And every one may easily perceive, that since for the deciding of Questions we must reason from the Nature and Design of Rules, from their Use, their Bounds and Extent, and other such-like Considerations, that our Arguments cannot be grounded, nor our Decisions framed, but upon the natural Principles of Justice and Equity.

We must also observe, as to this Necessity of studying the natural Laws, that they are of two Sorts. One is of those whereof a Man is persuaded, without reasoning, by the clear Evidence of their Truth: Such are these, That Arguments are in stead of Laws to those that make them; That the Seller ought to warrant his Goods; That he with whom any thing is deposited, ought to restore the *Depositum*. And the other Sort of these Rules are those which have not this clear Evidence, the Certainty whereof is not discover'd without some reasoning, which shews their Connexion with the Principles on which they depend. It will appear by some Examples what is this second Sort of Rules, and the Necessity of studying to know them.

XXIX.
Two sorts of
natural Rules:
Examples both
of the one and
the other sort.

If any Person who has not Children make a Grant of his Estate, and after that has Children, it is a Rule that the Grant is then no more in force; and the Equity of this Rule is very evident: For Nature design'd for Children the Estate of their Fathers^w; and it must be supposed that he who granted when he had no Children, would not have granted if he had had, or hoped to have any, which makes it to be a tacit Condition in his Grant, that it should be of no force, except in case he had no Children. But if it happens that these Children which were born after the Grant, die before the Donor has made any Motion to revoke it, there arises a Doubt, *viz.* Whether the Grant is confirm'd by the Death of the Children, or whether it remains null: And it is not so clear in this Case that the

N

Grant

^w If sons, then heirs. Rom. viii. 17. Eld. i. 9, 12.

Grant is null, as it is when the Children live; for since the Grant was not revok'd but in Favour of the Children, it may be doubted, whether this Motive ceasing by their Death, the Law which null'd the Grant ought not to cease also, and whether the Grant ought not to reassume its former Force; or whether on the contrary, the Grant being once null'd, it ought not always to continue so; and whether this Birth ought not to bring back the Estate into the Family to remain there, according to the Expression of the *Roman Law*, which made the Rule for revoking Grants by the Birth of Children: For 'tis said in that Law, that the Estate returns to the Donor, who is to be the Proprietor of it, and to dispose of it according to his Will: Which seems to be a tacit Decision of this Matter, that the Grant remains null. And this Rule is of the Number of those whose Evidence is not so clear, that it cannot be doubted of.

I shall add a second Example out of a thousand which may be seen in the Laws: If two Persons who have been at Law come to an Agreement among themselves, and accommodate their Difference, no body doubts but they must perform the Agreement. And this is a Rule which is clearly understood without reasoning about it. But if it happens that the Suit being ripe for a Decision, a Decree is made before the Parties have agreed, and they do afterwards make an Agreement, being ignorant of this Decree, in this Case there is not so clear Evidence, whether the Agreement nulls the Decree, or the Decree nulls the Agreement. For in general the Rule is certain, That Agreements are to be perform'd; but in the Case of an Agreement about a Suit which had been already determin'd by a Decree, this Rule ceases, because no Agreement can be made but only about Differences which are not decided, and no Man departs from his Right but for fear, and when he is in Danger of meeting with a disadvantageous Sentence. Thus in the Case where the Difference is decided, and there is no longer any Uncertainty or Danger in it, the Ignorance of him in whose Favour the Decree was made, ought not to hinder the Effect which the Authority of the Decision gives to Truth and Justice. And thus the Law determines when they are such Decisions from which there lies no Appeal. And this Rule is also one of those which of themselves are not so evident that no body can doubt of them.

From these two Examples we may perceive the Difference between those Rules whose Equity is discern'd at first Sight, and those wherein this Equity is not discover'd but by some Reflexions. But altho' it be true in these Examples, and an infinite Number of others of the like Nature, that in such Cases wherein the natural Equity of the Decision does not so clearly appear, it may seem that either of the two contrary Opinions may be indifferently taken for the Rule, and therefore that the Rule which is pitched upon, ought not to be consider'd as a natural, but only as a positive Law; it is nevertheless true, that all Rules of this Nature, whereof there is so great a Number in the *Roman Law*, which determine for one of the opposite Opinions from some Principle of natural Equity; are consider'd not as Laws merely positive, but as natural Laws, wherein the Decision was founded upon Reasons drawn from Equity. And thus we are to look upon all this Kind of Laws as such written Laws which are founded upon Reason that determines between contrary Opinions; and

and we are to consider these Laws only as merely positive, which are of such a Nature, that we cannot say, a Law different from them would have been contrary to the Principles of Equity. Thus, for Instance, 'tis altogether indifferent as to natural Equity, whether for the changing of Fiefs there ought to be a Writ of Restitution, or any other such-like, or whether there ought to be only a bare Homage; whether certain Rates be due for Sales only, or whether they be due for all Sorts of Purchases; whether Dowries should be govern'd by Custom without an Agreement, or whether there should be no Dowry unless it be agreed upon. Thus these Sorts of Things, and others of the like Nature are differently determin'd in divers Places; so that none can pretend that these Rules are natural Laws, but they are receiv'd only by the mere Authority of Custom, and as Laws purely positive. But the Rules which are drawn from the Decisions related in the *Roman Law*, such as we have just now mention'd, have the Character of natural Laws, by the Principles of natural Equity from which they are deduc'd.

There is also another Remark necessary upon this Subject of the Distinction of Laws natural, and Laws positive and mutable. That there are some Rules of Natural Right which seem sometimes to be abolish'd by contrary Laws as if they were only positive Laws. Thus the Law which entitles the Daughters together with the Males to the Inheritance of a Father, is a Law perfectly natural; and yet it was not observ'd in the Law which God himself gave to the *Jews*, for the Daughters did not succeed to their Fathers, when there were Males. And it was a Question even worthy of God to decide, *vis.* Whether the Daughters having no Brethren might succeed to the Estate of their Fathers. And God commanded that in this Case they should succeed *.

But though it may seem by this Law which thus excludes the Daughters, that either the Succession of Daughters is not a natural Right, or that a natural Right may be abolish'd; yet it is certain, that it always has been, and always will be a natural Right, that Daughters should succeed to their Fathers; and 'tis also certain that natural Right is never abolish'd. But another Principle of natural Equity excluded the Daughters from succeeding with their Brethren, without which it had been Injustice to the Daughters; for instead of the Right of succeeding, the Law has given them a Portion to marry them: And this Condition of Daughters has nothing in it but what is just and even natural, because with their Portions they find in the Family into which they marry, the Advantages they have left to their Brethren: And we see some Customs in the Kingdom of *France*, by which the Daughters married by their Fathers, even without a Portion, are depriv'd of all Succession, altho' they renounce it not, unless the Right of succeeding be reserv'd to them; because the Fathers having plac'd the Daughters in other Families by Marriage, this Settlement is to them instead of a Patrimony, and any Share in the Inheritance. Thus these Laws which exclude Daughters when there are Males, do not derogate from the natural Right which entitles the Daughters to Succession, but give them instead of that Right another Advantage which is equivalent to it.

XXXX
The difference
between
natural
Laws

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A Remark upon
the Words
of the Law

XXX:
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sometimes to
be abolish'd.

XXXIV
The Distinction
of Laws of
Nature and
Laws of
Men

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The distinction
between
natural
Laws
and
positive
Laws

* Numb. xxiii. Exod. xxi. 9. xxii. 17.

XXXI.
The different
Effects of some
natural Laws.

In fine, we must make this Remark upon the same Subject of natural Laws, That there are some of them, which although they be own'd for such in all Governments, yet have not every where the same Extent and the same Use. Thus there is no Government wherein it is not own'd to be a natural Right, that the Brothers and others in the collateral Line, are to succeed to those who leave no Heirs in the direct Line either ascending or descending, but in divers Places there is a very different Consideration of this Right. For in the Provinces of *France* which are govern'd by Customs, they have so great a Regard to the Right of the Heirs by Blood, as being a natural Law, that these Customs do not allow of any other Heirs; and they give them in some Places a greater, in others a lesser part of the Estate, which in all these Customs is call'd the Inheritance that cannot be taken from them, and can never be disposed of to their Prejudice, as the rest of the Estate may. But in other Provinces, which have for their Custom a written Law, every one has liberty to deprive his Kindred in the collateral Line; and even his Brethren, of all his Estate, and give it away to Strangers. And in these Provinces the natural Law, which gives a Right to the Heirs by Blood, is of no Force when they are excluded by a Will, and takes place only in the Successions to them that die *intestate*.

It appears by the Extent which these Customs give to the natural Law that gives a Right to Kindred in the collateral Line, and by the Bounds which the written Law sets to the same Right, that there is not every-where the same Idea of the natural Law which entitles the collateral Line to Successions; whereas there is every-where the same Idea of almost all the other Rules of the natural Law, and the same Force is attributed to them. As, for instance, all Governments do equally receive the natural Rules of Equity, which oblige the Heirs to discharge the Burthens that are upon the Inheritance, and those that make Contracts to perform their Agreements, &c.

This Difference between the uniform Usage every where, of almost all the natural Rules of Equity, and the different Ways of extending or bounding that which entitles the collateral Line to Successions, proceeds from hence, That there is not any Rule which has a contrary Tendency to this Sort of Rules which are every where observ'd; whereas there is a Rule which bounds that which entitles the collateral Line to Successions: For the Laws permit every Man to dispose of his Estate by Will; and the Use of this Liberty does necessarily lessen the Right of the Heirs by Blood. And since Nature has not fix'd this Liberty to a certain Point, the written Law has extended it so far as to dispose of all his Estate to the prejudice of the collateral Line; and the Customs have limited it to a certain Portion of the Estate, although these same Customs permit a Man to deprive the collateral Line of any Share in an Inheritance, by making a Grant of it in his Life-time; because there is this Difference between the Grant of it in his Life, and the Disposal of it upon the account of Death, that in the latter none but his Heir is divested of it, but in the other he himself is divested of that which he gives away.

XXXII.
Laws divine
and humane,
natural and positive.

To finish what is to be said of this first Distinction of immutable and mutable Laws, it remains only to be observ'd, that this Distinction includes that of Laws divine and humane, and also that of Laws natural

natural and positive, or rather that these three Distinctions are in effect but one and the same; for there are no natural and immutable Laws but those that come from God, and humane Laws are positive and mutable, because Man can enact, change, and abolish them.

Some perhaps may think that the divine Laws are not immutable, since God himself abolish'd many of those which he gave to the *Jews*, because they were not agreeable to the State of the Church under the new Law. But nevertheless, 'tis certain that these Laws were immutable with respect to Men, and that the divine Laws which regulate our present State, are no more capable of any Change. Upon which Occasion we must observe, that the Dignity of the Name of the divine Laws is referred to those which concern the Duties of Religion; such are the two primary Laws, the Decalogue, and all the Precepts in the Sacred Scripture about Faith and Manners. And as to the Detail of the immutable Laws of Equity, which concern Matters of Contracts, of Testaments, of Prescriptions, and other Matters of the Civil Laws, although these Rules derive their Justice from the divine Law which is the Source of them, yet they have only the Name of natural Laws, or natural Right; because God has engraven them on our Nature, and render'd them so inseparable from Reason, that Reason is sufficient to understand them, and even those who are ignorant of the prime Precepts of the Design of the divine Law know these Rules, and use them as Laws.

XXXIII.
A Remark upon the Words divine Laws.

After this first Distinction of immutable and mutable Laws, we must set down a second which comprehends also all Laws under two other Ideas, whereof one is the Law of Religion, the other the Law of Policy. And these two Distinctions must not be confounded, as if all the Laws of Religion were immutable Laws, and all the Laws of Policy were only mutable Laws: For there are in Religion many mutable Laws, and in Policy many that are immutable. Thus there are in Religion some Laws which regulate the Ceremonies of external divine Worship, or some Points of Ecclesiastical Discipline, which are mutable Laws appointed by the Authority of the spiritual Powers; and there are in Policy immutable Laws, such are these which command Obedience to Powers, which enjoin to give every one his Due, to do no Hurt to any Body: Such are these which command Candor, Sincerity, and Faithfulness, and condemn Deceit and Cheating; and an infinite Number of particular Rules that depend upon these prime Laws. It is therefore a thing common both to Religion and Policy, that each of them make use of immutable and mutable Laws, and consequently we must distinguish the Laws of Religion and Policy by other Considerations.

XXXIV.
The Distinction of Laws of Religion and Laws of Policy.

The Laws of Religion are those which regulate the Conduct of a Man by the Design of the two prime Laws, and by such internal Dispositions as incline him to all his Duty towards God, himself, and his Neighbours, either in private Affairs or in what concerns the Publick: Which Description comprehends all the Rules of Faith and Manners, and also all those about the external Worship of God, and Ecclesiastical Discipline.

The Laws of Policy are those which regulate the external Order of Society among all Men, whether they know or be ignorant of Religion, whether they observe its Laws or despise them.

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XXXV.
Religion and
Policy have
some Laws
that are com-
mon, and each
of them hath
its own pecu-
liar Laws: Ex-
amples of these
three Sorts.

By these first Remarks about Laws of Religion, and Policy we may perceive, that they have some Rules that are common to them, and both the one and the other have their own peculiar Rules.

Thus the Laws which command Submission to the natural Power of Parents, and to the Authority of Spiritual and Temporal Powers, according to the Extent of their Office; those which enjoin Sincerity and Faithfulness in Commerce; those which forbid Murther, Theft, Usury, Deceit, and others of the like Nature, are Laws of Religion, because they are essential to the two primary Laws; and they are also Laws of Policy, because they are essential to the Order of Society; and so they are common both to Religion and Policy: But the Laws which concern Faith and the inward Dispositions of the Mind, and those which regulate the Ceremonies of Divine Worship and the Ecclesiastical Discipline, are Laws peculiar to Religion; and the Laws which regulate the Formalities of Testaments, the Time of Prescriptions, the Value of publick Money, &c. are Laws peculiar to Policy.

XXXVI.
The Laws
common to
Religion and
Policy have
different Ends
one from the
other.

But as to the Laws which are common to Religion and Policy we must observe that in every thing they have a different End one from the other: For in Religion these Laws oblige us to an upright Intention of Heart, which does not only fulfil the Letter of them in our external Actions, but also observes the Design of them in our inward Thoughts and Affections; and in Policy they require only an external Compliance with their Commands, and attempting nothing against their Prohibitions. Thus altho' Religion and Policy have one common Foundation which is the Divine Appointment, and the same common End which is to govern Men; yet they have different Ways of compassing the same End: For Religion regulates the internal Affections and Dispositions of Man, and so excites him to his whole Duty; but the Office of Policy reaches no farther than the external Actions without any Dependence on the internal.

XXXVII.
The Differ-
ence between
the positive
Laws of Reli-
gion and of Po-
licy.

We must also farther observe this Difference between the positive Laws of Religion and of Policy, that the latter are commonly call'd humane Laws, because they are Laws made by Men, and are founded on humane Reason; but although the positive Laws of Religion are also made by Men, yet they are not call'd humane Laws, but Canons and Constitutions, or the Laws of the Church, because they are founded on the Direction of the Divine Spirit which rules the Church.

'Tis not necessary here to enlarge farther on this Distinction of Laws of Religion and Policy: It remains only that we consider the general Order of the Laws of Temporal Policy, that we may know what Rank the Civil Laws have among them.

XXXVIII.
The Laws of
Temporal Po-
licy.

The Laws of Temporal Policy are of many Sorts according to the different Parts of the Order of Society which they regulate.

XXXIX.
The Laws of
Nations.

Since all Mankind compose one universal Society, which is divided into different Nations who have their separate Governments, and that these Nations have different Entercourses among themselves, it was necessary that there should be Laws to regulate the Order of these Entercourses, both for Princes among themselves and for their Subjects; and particularly the Manner of receiving Ambassadors, of Negotiations, Treaties of Peace, and all the ways wherein Princes and their Subjects maintain Commerce and other

Corre-

Correspondence with their Neighbours. And even in Time of War there are Laws which regulate the Methods of declaring War, which moderate Acts of Hostility, which maintain the Use of Mediations, of Truces, of Suspension of Arms, of Surrendring upon Terms, the Security of Hostages, &c.

All these things could not be regulated but by some Laws, and since the several Nations had not any Authority to impose them upon one another, there are two Sorts of Laws which serv'd for Rules between them. One Sort is, the natural Laws of Humanity, Hospitality, Faithfulness, and all others which depend upon these primary Laws, and which regulate the Methods wherein the People of different Nations are to use them between themselves in Time of Peace and War. The other Sort is, the Regulations which the Nations agree upon by Treaties, or by such Usages as they settle between themselves, and mutually observe. And the Infractions of these Laws, Treaties, and Usages, are restrain'd by open Wars, by Reprisals, and other Ways suited to the Ruptures and Attempts.

Such are the common Laws between Nations, which may be call'd, and which we commonly call the Law of Nations, altho' this Word is taken in another Sense in the *Roman Law*, where it comprehends under the Law of Nations, even Contracts, such as Sales, letting to Hire, Partnership, Pledges, and other Things, for this Reason because they are made use of in all Nations.

The universal Policy of Society which regulates the Entercourse between Nations by the Law of Nations, governs each Nation by two Sorts of Laws.

XL.
Publick Right.

The first is of those which concern the publick Order of Government, and are call'd State-Laws, which regulate the Ways whereby Sovereign Princes are intitled to the Government, either by Succession or Election; those which regulate the several Distinctions and Duties of publick Offices, for the Administration of Justice, for managing the Militia, the Treasury, and these Offices which are call'd Municipal: Those which concern the Rights of a Prince, his Demains, and his Revenues; the Government of Cities, and all other publick Regulations.

The second Sort is of those that are call'd private Right which comprehends the Laws that regulate between private Persons all Agreements, Contracts of all Sorts. Guardianship, Prescriptions, Mortgages, Successions, Testaments, &c.

XLI.
Private Right,
which regulates
Affairs
between private
Persons.

These are the Laws which regulate Matters between private Persons, and the Differences which may arise about them, which it seems most Men commonly understand by *Civil Right*. But this Idea would comprehend also under civil Right many Matters of publick Right, of the Right of Nations, and even Ecclesiastical Right, since there often happen Affairs and Differences between private Persons in Matters of Publick Right; as for Instance, in the Duties of Offices, in the Levying of Taxes, and other such like Matters: And it often happens also that private Men have Differences in Matters belonging to the Right of Nations, by the Consequences of Wars; by Reprisals, by Treaties of Peace; and even in Ecclesiastical Matters,

XLII.
Civil Right,
or the Civil
Laws.

¹ L. 5. ff. de just. & jur. § 2. in fine Inst. de Jur. nat. gent. & civ.

Matters, as about Benefices and other Things. And in fine, the Distribution of Justice to private Persons includes the Use of many Laws, which are general Regulations of the publick Order; such are those which settle the Penalties of Crimes, which regulate judicial Proceedings, the Duties of Judges, and their different Jurisdic-tions. Upon which account it is difficult to frame a just Idea, which will clearly and nicely distinguish the Civil Laws from publick Right, and other Kinds of Laws.

XLIII.
Divers ways of
conceiving the
Laws which
compose the
Body of Civil
Law.

'Tis this Mixture of all these Sorts of Laws, which diversifies the Ways of them, and makes it difficult to reconcile the Sense which is given in the *Roman Law* to these Words *Civil Right*, with that which now we give them; as it is difficult also to reconcile the Ideas which we now have commonly of natural Right, and the Right of Nations, with those which the Distinctions found in the *Roman Law* give of them.

XLIV.
The Division
of Laws in the
Roman Law.

Laws are distinguish'd in the *Roman Law* into *Publick*, which concern the State of the Commonwealth; and *Private*, which concern Private Persons². This latter is divided into three Parts, whereof the first is concerning Natural Right, the second concerning the Right of Nations, and the third concerning Civil Right³. Natural Right is, that which is common to Men and Beasts^b. The Right of Nations is extended to all the Laws which are common to all People, and under them are comprehended Contracts which all Nations make use of^c. And Civil Right is restrain'd to the Laws which are peculiar to one People, which must exclude from Civil Right Contracts, and all other Matters which are common to all People, and which were comprized under the Right of Nations^d.

XLV.
Divers ways of
dividing Laws
according to
different
Views.

It plainly appears, that this Distinction, as it is explain'd in the *Roman Law*, seems different from that which is used among us, who do not reckon in the Number of Laws which are call'd the Laws of Nations, those which regulate Matters of Agreement, and do not limit Natural Right to that Idea which is given of it in the *Roman Law*. But since there is nothing more arbitrary than the Ways of dividing and distinguishing such Things as may be look'd upon with different Views, and the different Distinctions may have their several Uses, provided we conceive no false Ideas of that which is essential to the Nature of Things; 'tis not worth the while to insist upon the Reflections on these different Ways of distinguishing Laws, and it may suffice to have made the Remarks which are most essential about their Nature and Properties, and to have given these general Ideas, from which every one may frame to himself such Distinctions as shall appear to him most just and natural. And as to the Idea we ought to have of Civil Right, it may be sufficient to observe, that we never limit the Sense of these Words to Laws peculiar to one City or People; and likewise, that we never extend them to all the Laws, which regulate Matters as to any Differences which may arise between private Persons. As for instance, we distinguish the

² L. 1. § 2. ff. de just. & jure. Inst. eodem.

^a L. 1. § 2. in fine ff. de just. & jur. § ult. Inst. eodem.

^b L. 1. § 3. ff. de just. & jure Inst. de jure nat. gent. & civ.

^c L. 5. ff. de just. & jure § 2. Inst. de jure nat. gent. & civ.

^d § 1. & 2. Inst. de jure nat. gent. & civ. l. 9. 1. ff. de just. & jure.

the Civil Law from the Canon Law, and even from Customs and Edicts: And the Signification of these Words appears to be fix'd to such Laws as are collected together in the *Roman Law*, to distinguish them from our other Laws: And also the bare Name of the *Civil Law* is given to the Books of the *Roman Law*, and by this Name they are intitled, although these Words in the same Books are restrain'd to another Sense, as I have just now remark'd. Thus the Civil Right in this Sense will comprehend many Matters of publick Right, and even some Ecclesiastical Matters which are found collected together in the Books of the *Roman Law*; and it will also comprehend every thing that is in these Books, that is not used among us, and which are nevertheless to be studied by those that learn the *Roman Law*, upon the account of the Relation they may have to such Matters as are in use among us.

It remains now only that we mention the last Distinction that is commonly made of Laws into *Written Laws* and *Customs*. Written Laws are such as are in Writing, and this Name is particularly given to those that are written in the *Roman Law*. The *Customs* are Laws, which originally were not written, but were received either by the Consent of People, or by a Kind of Agreement to observe them, or by an insensible Usage which authorized them.

XLVI.
Written Law,
Customs.

Before we finish this Subject of the Nature and Design of Laws, 'tis necessary to observe a different Use of some Principles from what can be made of others; which consists in this, that many of these Principles are such, that 'tis easy and necessary to reduce them into fix'd Rules, whereof the Application is obvious, whereas there are others which cannot be reduced into such Rules.

XLVII.
Two sorts of
Principles, one
of those which
may be reduc'd
into Rules, the
other of those
which cannot
be so reduced.

The Principles, for instance, that positive Laws are such Things as Men are naturally ignorant of, but no Man can be ignorant of natural Laws, are two Truths that may be explain'd by fix'd Rules, the Use whereof is obvious: One is, that positive Laws do not oblige, and are not in Force until after they have been publish'd; and the other is, that natural Laws are in Force without Publication.

But there are other Principles which cannot after the same Manner be reduced into fix'd Rules, whereof 'tis easy to make Application. As for instance, that we must consider in all Questions, what are the Causes from whence the Difficulties arise; that we must discern the Rules from which the Decision is to be made, and balance in each of them its proper Use, the Bounds or Extent it ought to have. These Principles cannot be reduced into precise Rules, whereon Decisions may be grounded. And there are many other Principles of divers Sorts, whereof it is not easy to make Rules, and fix the Use of them; as will appear by the bare reading of these Principles in the Places where they have been related. But nevertheless they have their Use by the different Views they give in the particular Application of all Rules.

This Difference between the Principles from which precise Rules may be drawn, and those which cannot be fix'd after this Manner, has obliged me to add here some Reflexions upon some part of the Principles that have been laid down, that we may discover in them such Truths, from which many necessary Rules may be drawn, for the better understanding of the Civil Laws, and making a just Application of them. And because these Rules are a considerable part

of the Civil Law, and will be set down in the first Section of Chapter XIII. where they are to be separated from these Reflexions, which discover their Connexion with the Principles on which they depend, these Reflexions shall be the Subject of the following Chapter.

And as to what concerns the other Kind of Principles, which cannot be reduc'd to Rules, it may suffice to observe in general, that the good Use of these Truths must depend upon good Sense and Judgment, and the various Views that can be given by Study, Experience, and the different Reflexions upon the Facts, and the Circumstances from whence the Difficulties arise which are to be decided. And in this Use of Judgment, and the exact and distinct Perception of all these Views, consists the most essential Part of the Knowledge of Laws, which is nothing else but the Art of discerning Justice and Equity.

C H A P. XII.

Reflexions upon some Remarks in the preceding Chapter, which are the Foundation of divers Rules concerning the Use and Interpretation of Laws.

I.
Natural Laws regulate both what is past and what is to come, though they be not published; and positive Laws regulate only what is to come after their Publication.

WE have already seen, That natural Laws are such Truths as Nature and Reason teach Mankind, that they have of themselves, Justice and Authority, which oblige us to observe them, and that no Person can be excus'd by his Ignorance of these Laws: That on the contrary positive Laws are such as are naturally unknown to Men, and do not oblige until they are publish'd. From whence it follows, that natural Laws regulate all that is past, and all that is to come. But positive Laws meddle not at all with what is past, which are regulated by the preceding Laws, and are of no Force but only as to Things future; and to give them this Force, they are written, they are publish'd, they are register'd, that no Person may pretend Ignorance of them. And because it is not possible to make them known to each particular Person, 'tis sufficient to give them the Force of Laws, that there be a publick Advertisement of them: For then they become publick Rules, which all the World ought to observe; and the Inconveniences which may happen to some particular Persons for want of knowing them, does not balance their general Usefulness.

II.
When new Laws refer to those that are old, they mutually interpret one another.

But altho' positive Laws be of no Force but as to Things future, yet if what they ordain be found agreeable to natural Right, or some positive Law now in Use, they have such a Force as to what is past, as their agreeableness and relation to natural Rights and ancient Customs can give them: And they help also to interpret them after the same Manner that ancient Rules conduce to the Interpretation of those that are new. And thus the Laws mutually sustain and explain one another.

We

We have shewn that positive Laws, whether they were established by those who had the Authority of making Laws, or by some Usage and Custom, are always founded upon some Usefulness, either to prevent and remove Inconveniences; or upon some other View of the publick Good: From whence it follows, that although other Inconveniences happen from these Laws, than those they have remov'd, and that sometimes we do not so much as know upon what Motives this Sort of Laws was made; and what is their Usefulness; yet it ought to be presum'd, that the Law now in Force is useful and just, until it be abrogated by another Law, or abolish'd by Disuse.

III.
The Usefulness of a Law is to be presumed, notwithstanding Inconveniences.

We have seen that Customs and Usages are instead of Laws; and if they have the Force of Laws, from hence it follows *a fortiori*, that they may serve as Rules for the Interpretation of other Laws. And there is no better Rule for explaining Laws that are obscure or ambiguous, than the Manner in which Custom and Usage interpret them.

IV.
Customs and Usages interpret Laws.

We have shewn that the Authority of Customs and Usages is founded upon this Reason, that it ought to be presum'd that what has been a long Time observed is useful and just; from whence it follows, if any Law or Custom hath for a long Time ceased to be in Use, that it is abolished. And as it had its Authority from long Use, so the same Cause can take it away. For it shews that what has ceased to be observed, was no longer useful.

V.
Disuse abolishes Laws and Customs.

From the same Presumption, That what has been a long Time observed is useful and just, it follows also, That if in some Provinces and Places there want Rules in certain difficult Cases as to some Matters there made Use of, which are not particularly regulated as to this Kind of Difficulties, and that they be found regulated in other Places where the same Matters are also in Use, 'tis natural to follow the Example of these Places, and chiefly that of the principal Cities. Thus we see in the *Roman Law*, that the Provinces conform'd to what was the Usage at *Rome*.

VI.
The Laws and Customs of neighbouring Places serve as Examples and Rules.

We have shewn that Laws must be understood and applied according to their Design and Intention: That in order to a right Judgment of the Sense of a Law, we must consider upon what Motives it was made, what were the Inconveniences it provided against, the Usefulness arising from thence, its relation to ancient Laws, the Changes it made in them, and make other Reflexions by which its Sense may be understood; from whence it follows in the first Place, that for discovering by all these Views the Intentions and Design of Laws, we must examine in them what they declare, what they ordain; and judge always of the Sense of a Law and its Design, by the whole Series and entire Tenor of all its Parts, without curtailing any thing in it.

VII.
We must judge of the Sense and Design of a Law by its whole Purport

It follows also from the above-mentioned Remarks about the Design and Motive of a Law, That if some Terms or Expressions of a Law, appear to have a Sense different from that which is otherwise evidently intended by the Tenor of the whole Law, we must adhere to this true Sense, and reject that other which appears from some Terms that are contrary to the Design.

VIII.
We must rather adhere to the Sense of a Law, than to the Words which appear to be contrary to it.

It follows also from the same Remarks, That when the Expressions of a Law are defective, we must supply the Want to fill up the Sense according to the Design.

IX.
The Want of an Expression is to be supplied by the Design of a Law.

X.
Laws which
are to be fa-
vourably ex-
tended.

It is also a Consequence from the same Remark about the Design of Laws, that some of them are to be interpreted in such a manner, as gives them all the Extent they can have without prejudice to Justice and Equity; and that on the contrary, there are others which ought to be restrain'd to a Sense more limited. Thus the Laws which concern in general any Matter of natural Liberty, those which permit all Kinds of Agreement, and all those which favour Equity, are to be interpreted with all the Extent which can be given them, without Prejudice to other Laws and good Manners. Upon which account the Causes which the Laws thus favour, are call'd *Favourable*. But the Laws which derogate from this Liberty, which forbid what is not of itself unlawful; those which derogate from common Right, which make Exceptions, which grant Dispensations, and others of the like Nature, are to be restrain'd to the Cases they regulate, and to what is expressly contain'd in them.

XI.
Laws which
are to be re-
strain'd.

XII.
The Equity
and Rigour of
Law.

To these different Interpretations which extend some Laws and restrain others, we may refer the Rules which concern the equitable Mitigations that may be used on some Occasions, and the Rigour of Law which must be taken on others.

But I shall not stop here to give Examples of these different Interpretations, nor to explain the Difference between the Equity and Rigour of Law, and the Usage both of the one and the other. These Particulars shall be examined in their proper Places. Only it must be observ'd, as to this Sort of Causes which are commonly call'd *Favourable*, such as those of Widows, of Orphans, of Churches, of Portions, of Testaments, and others of the like Nature, that this Favour ought always to be understood in such a Manner, that it may no wise prejudice the Interest of third Persons, and that the Favour of these Sorts of Causes ought not to be extended beyond the Bounds of Justice and Equity.

XIII.
The Interpre-
tation of the
Benefits of
Princes.

Upon the same Principle of a favourable Interpretation of some Laws, and the straitning the Bounds of others, depends the Rule of the two different Interpretations of the Will of Princes, in the Gifts and Privileges they grant to some Persons. For when these Gifts are such that a full Extent may be given them without Prejudice to other Persons, the Interpretation is always made in favour of him whom the Prince is pleased to honour with this Benefit, and an Extent is given to it suitable to what the Liberality natural to Princes requires. But if it be a Gift or Privilege which cannot be interpreted after this Manner without doing Prejudice to other Persons, it must be restrained to that which might be granted without doing them an Injury.

XIV.
Divers Effects
or Uses of
Laws, viz.
To order, per-
mit, forbid,
and punish.

We have seen what are the Foundations of the Justice and Authority of Laws, and that they being Rules for the well-ordering of Society, ought to vary the Effects of that Authority; according to the different Means that are necessary for settling and maintaining this good Order. From whence it comes to pass, that many Laws ordain, some forbid, and others permit, and all punish and restrain those who violate their several Orders; whether it be that they do not perform what the Laws prescribe, or that they undertake what they forbid, or that they exceed the Bounds of what they permit. And according to the several ways of violating the Directions and Design, they deprive those of their Effects who fail in that which they

they ordain; they punish those who do what they forbid, or do not what they command; they annul what is done contrary to the Order they prescribe; they repair the Damages that follow upon Violations; they take Vengeance for every thing contrary to their Prescriptions; and lastly, they maintain their Authority by all the Ways necessary to preserve Order.

It follows also from the same Remark about the Justice and Authority of Laws, that they restrain not only what is directly contrary to their express Orders, but also what indirectly contravenes their Intention: And whether it appear that one hath acted contrary both to the Design and Letter of the Law, or that he has only violated the Design, while he appear'd to keep to the Letter of the Law, he is certainly liable to the Punishment of it.

Since the Laws are the Rules of the universal Order of Society, from hence it follows, that no Law is made to serve only for one single Person, or for one Case, or one particular Fact; but they provide in general for every thing that may happen, and their Directions respect all Persons, and all Cases to which they can extend. Upon which account the Wills of Princes which are limited to some particular Persons and some single Facts, as a Pardon, a Gift, an Exemption, and other such-like, are Graces, Concessions, Privileges, but not Laws. And although particular Cases be often the Occasion of new Laws, yet they do not even regulate these Cases which were the Occasions of them, and which were regulated after a different Manner by the preceding Laws; but they provide only for the future Regulation of all Cases like that which gave the Occasion. Thus the Edict about Mothers; and that about second Marriages have provided against the Inconveniences to come; and the preceding Cases have been regulated according to the Direction of the Laws that were formerly in Force.

Lastly, It is another Consequence from the preceding Remark, that since the Laws are general Rules; they cannot regulate Futurities, so as to provide expressly against all Events which are infinite, and to reach all possible Cases; but it is the Prudence and Duty of the Lawgiver to foresee the Events that are most natural and most common, and to frame his Rules in such a Manner, that without entering into the Detail of particular Cases, they may be common to all, making a Difference where any Case merits either Exceptions or particular Orders. And after this, it is the Duty of the Judges to apply the Laws not only to what is expressly determin'd by them, but to all Cases which will admit a just Application of them, and are comprehended either in the express Words of the Law, or in the Consequences that may be drawn from it.

We have seen that all the Laws are derived from the two first as their Source, that many depend upon others as being Deductions from them, and that all of them regulate either in general or in particular the different Parts of the Order of Society, and all sorts of Matters: From whence it follows, that all Laws are more or less general proportionably as they come nearer unto, or are farther removed in their Descent from the two first. Thus some are common to all sorts of Matters, as those which enjoin Sincerity and forbid Deceit and Fraud, and other such like. Others are common to many Matters but not to all; as for instance, this Rule, that Agree-

XV.
The Laws restrain not only what is directly contrary to their Orders, but also what indirectly opposes their Design.

XVI.
Laws are made for what commonly happens and not for one single Case.

XVII.
The Extent of Laws according to their Design.

XVIII.
There are general Rules common to all Matters, others common to many Matters, and others peculiar to one.

* Transaction is a voluntary Accommodation of Matters in Difference by the Parties concern'd.

ments are instead of a Law to them who make them, is common to Sales, Exchanges, Letting to hire, * Transactions, and all other Kinds of Agreements; but has no relation to the Matter of Guardianship or Prescriptions. Thus the Rule of Rescission for the Loss of more than one half of the just Price, takes place in the Alienation of an Inheritance made by a Sale, but not in an Alienation made by a Transaction.

XIX.
The Importance of distinguishing these three Sorts of Laws.

From this Remark it follows, that in the Study and Application of the Laws, it is a Matter of Importance, to know and distinguish the Rules that are common to all Matters indifferently, those which extend to many Matters but not to all, and those which are peculiar only to one, that so we may not extend, as many do, a Rule peculiar to one Matter to another, in which it is of no Use, or would be false. Thus, for Instance, This Rule is found in the *Roman Law*, that in ambiguous Expressions we must chiefly consider the Intention of him that speaks¹. This indefinite Rule being found under a Title of divers Rules about all Matters, without any Direction to which it is peculiar, appears to be general and common to all: And if it be apply'd to all indifferently, we must conclude, that in Contracts as well as Testaments, an ambiguous Expression must be interpreted by the Intention of him whose Will it was to declare. And yet this Application, which will always be just in Testaments, will often be found false in Contracts: For in Testaments one only speaks, and his Will is to serve for a Law; but in Contracts the Intention both of the one and the other is the common Law. Thus the Intention of one ought to answer to that of the other, and they must understand one another, and agree together, and according to this Principle it often happens, that an ambiguous Clause is not to be interpreted by the Intention of him who expresses it, but rather by the reasonable Intention of the other. Thus in a Sale, if the Seller makes use of an ambiguous Expression about the Qualities of the Thing sold; as if he that sells a House should say, That he sells it with its *Services*, without distinguishing, whether they be Services that the House is to pay, or which are to be pay'd to it; and then the House is found subject to a secret Service, as to a Right of Passage, to a Condition of not being rais'd higher, or any other such-like; which is so great an Inconvenience, that the Purchaser, if he had known it, would either not have purchas'd the House at all, or not have purchas'd it except at a lower Price; this ambiguous Expression of the Seller is not to be interpreted by his own Intention, but by the Intention of the Purchaser, who was not bound to understand that the House was subject to such a Service: And this Seller shall be oblig'd to the Effects of his Warranty according to the Rules in that Matter.

XX.
The Discernment of Exceptions.

We have shewn that some Laws are so general, and so well secur'd throughout, that they admit of no Exception; and on the contrary, there are many Laws which have Exceptions. And from this

¹ *In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset.* l. 96. ff. de reg. jur.

² 'Tis remarkable that this Law is taken out of a Treatise of *Mecianus* upon *Fidei-commissa*, or Trusts.

this Rule it follows, that we must not apply general Rules indifferently to all Cases which their Words seem to comprehend, for fear lest we extend them to such Cases as are excepted from them: Upon which Account the Knowledge of Exceptions is necessary.

'Tis a Remark of great Importance, that there are two Sorts of Exceptions; those which are made by positive Laws, and those which are made by natural Laws. Thus there was a positive Law among the *Romans*, which excepted Military Testaments from the general Rules about the Formalities of a Testament; and 'tis also a positive Rule in Use among the *French*, that Rescissions for the Loss of more than half of the just Price, does not take place in Sales made by a Decree. Thus it is a natural Law, that no Agreements can be made which are contrary to the Laws and good Manners; and this Law is an Exception to a general Rule, that any one may make all Sorts of Agreements: And another natural Law excepts from the Rule of the Restitution of Minors, such Obligations as were entered into upon a reasonable Consideration.

XXI.
Two Sorts of
Exceptions,
natural and po-
sitive. Exam-
ples.

We may easily perceive that the Exceptions which are made by positive Laws, are to be discovered by bare Reading and by Memory, and so they require only Study to know them. But the Discernment of the Exceptions which are made by the natural Law, do not always depend upon bare Reading, but they require Reasoning. For there are natural Exceptions which are not written in Laws; and even those which are written, are not always joyn'd to the Rules which they restrain. The Knowledge therefore of Exceptions, which is so necessary, does equally require both Study in general, and in particular great Attention to the Design of the Laws to which they must be apply'd, lest we straiten the Exceptions by giving too great an Extent to the general Rules.

We may add as the last Remark, what is a Consequence from all the rest, that all the different Considerations which are so necessary for the Application of Laws, require the Knowledge of their Principles, and the Deductions from them, and so are directed by the Guidance of a good Judgment, together with Study and Experience. For without this Foundation there is Danger, lest we make false Applications of the Laws, either by misapplying them to other Matters than what they relate to, or by not discerning the Bounds which Exceptions set to them, or by giving too great an Extent to Equity against the Rigour of Law, or to this Rigour against Equity; or for the want of other Considerations which are to regulate the Use of Laws.

XXII.
Advice about
the Use of
Rules.

C H A P. XIII.

Of the Rules of Law in general.

THE Rules which will be explain'd under this Title, concern in general the Nature, Use, and Interpretation of Laws: And since these Rules are common to all Matters, and are very frequently made use of, we must not content ourselves with the bare Reading

The Matters
of this Title.

reading of them once, but it will be useful to read them over again from Time to Time, and to have Recourse to them upon Occasion.

SECT. I.

Of divers Sorts of Rules, and their Nature.

Of the Ideas
which the
Words *Laws*
and *Rules* give
us.

BY the Words *Laws* and *Rules*, we commonly understand, that which is just, which is ordain'd, which is regulated. And it must be observ'd, That since the *Laws* ought to be written, that so the Writing may fix the Sense of the Law, and determine the Mind to a true Idea of the Matter regulated by it, and that every one is not at liberty to frame the Law as he would understand it; we may distinguish two Ideas which are given by the Words *Law* and *Rule*, one is the Idea of that which is conceived to be just, although we make no Reflection upon the Words of the Law; the other is the Idea of the Words of the Law; and according to this second Idea, a *Rule* or a *Law*, is call'd a *Declaration of the Lawgiver*.

We shall indifferently make use of the Word *Laws* and the Word *Rules*, in either of these two Senses, in this Book, as Occasion requires: For there are many *Laws* written, viz. such as are positive *Laws*, and there are many natural *Rules* of Equity which are not written.

'Tis not necessary, after all has been said of *Laws* and *Rules* in the Treatise of *Laws*, to define a-new under this Title, what is a Law; and what is a Rule; but it will be sufficient here to give an Idea of the Rules of Law in that Sense, which signifies written Rules, because all the Science and Study of *Laws* consists in the Knowledge of the *Laws* that are written.

I.

I.
A Definition
of Rules.

Rules are short and plain Declarations of the Demands of Justice in divers Cases, and each Rule has its own peculiar Use with respect to those for whom it was appointed. Thus, for instance, many Accidents happen, whereby the Buyer is deprived of what he bought, or is troubled by those who pretend to be Owners of it, or to have some other Right to it: And it is a piece of Justice common to all these Kind of Accidents, that the Buyer should be secured against Evictions and all other Troubles, which is comprized in this short Rule, that every Seller ought to warrant what he sells^h.

II.

II.
Two sorts of
Rules, natural
and positive.

There are two Sorts of *Laws*, one is those which are of natural Light and Equity; the other a positive, which are otherwise call'd humane and mutable, because they are made by Menⁱ. Thus it is

^h *Regula est, quæ rem quæ est breviter enarrat. l. 1. ff. de reg. jur. Ex jure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur. d. 1. Rei appellatione & causæ & jura continentur. l. 23. ff. de verb. sign.*

ⁱ *Omnes populi qui legibus & moribus reguntur, partim suo proprio, partim communi omnium hominum jure utantur. Nam quod quisque populus ipse sibi proprium jus constituit, id ipsius proprium Civitatis est. l. 9. ff. de just. & jur. Quod verò naturalis ratio inter omnes homines consti-*

is a Rule of natural Light, that the Grant may be revoked for the Ingratitude of the Grantee; and it is a positive Rule, that Grants made in one's Life-time ought to be registred.

III.

The Rules of natural Right are those which God himself hath appointed, and which Men are taught by the Light of Reason: These Laws are immutably just, and are the same always and every-where; and whether they be written or not, no humane Authority can abolish them, or change any thing in them. Thus the Law which obliges the Depositary to preserve and restore the *Depositum*, That which obliges a Man to take care of a Thing that's borrow'd, and Others of the like Nature are natural and immutable Laws, which are every-where observ'd^k.

III.
What are natural Rules.

IV.

Positive Rules are all those of humane Appointment, and which, without prejudice to natural Equity, may be establish'd either one Way or another quite different. Thus for instance, the Use of Fiefs may be appointed or not appointed. Thus Prescriptions may be fix'd to a longer or shorter Time, and the Witnesses of a Will to a greater or lesser Number. And this Diversity which is not determin'd by Nature, makes the Authority of these Laws depend upon the Free-will and Pleasure of the Legislator, who makes them; and consequently renders them liable to Changes^l.

IV.
What are positive Rules.

V.

Rules of Law, whether natural or positive, are of three Sorts; some are general, which agree to all Matters; others are common to many Matters, but not to all; and many are peculiar to one Matter, and have no relation to others. These Rules, for instance, of natural Equity, That we must do no Injury to any Man, That we must render to every one what is his due, are general, and extend to all Sorts of Matters. This Rule, that Agreements are instead of Laws, is common to many Matters, for it agrees to all Kinds of Contracts, Agreements, and Pacts, but it agrees not to Wills nor many other Matters. And the Rule of the Rescission of Sales, upon the account of being wrong'd more than half the just Price, is a Rule peculiar to a Contract of Sale. Thus in the Use and Application

V.
Another Division of Rules.

constituit, id apud omnes homines per æquè custoditur. d. l. 9. Jus pluribus modis dicitur; uno modo cum id, quod semper æquum ac bonum est, jus dicitur, ut jus naturale; altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est jus civile, nec minus jus rectè appellatur in civitate nostra, jus honorarium. l. 11. ff. de just. & jur. See Chap. 11. of the Treatise of Laws.

^k *Naturalia jura quæ apud omnes gentes per æquè observantur, divina quadam providentia constituta, semper firma ac immutabilia permanent. § 11. Inst. de jur. nat. gent. & civ. Quod naturalis ratio inter omnes homines constituit. l. 9. ff. de Inst. & jur. Id quod semper æquum ac bonum est, jus dicitur, ut jus naturale. l. 11. cod. Civilis ratio naturalia jura corrumpere non potest. l. 8. ff. de cap. min.*

^l *Ea vero quæ ipsa sibi quæque civitas constituit sæpe mutari solent. § 11. Inst. de jur. nat. gent. & civ.*

cation of Rules we must discern in each both its Bounds and Extent ^m.

VI.

VI.
Two Ways of
abusing Rules.

All Rules cease to have any Effect, not only when they are apply'd beyond their Bounds, and to such Matters as they have no Relation unto, but also when in their proper Matters they are wrested to a false or vicious Application contrary to their Design. Thus the Rule about Rescission of Sales, upon the Account of being wrong'd of more than half the just Price, would be ill apply'd to an Accommodation for putting an End to a Suit ⁿ.

VII.

VII.
Exceptions are
Rules.

Exceptions are Rules which limit the Extent of other Rules, and order Matters otherwise by particular Considerations, which render either just or unjust, that which the Rule understood without Exception would have render'd on the contrary either unjust or just. Thus, for Instance, the general Rule that all Sorts of Agreements may be made, is limited by the Rule, which forbids those Agreements that are contrary to Equity and good Manners. Thus the Rule which forbids to alienate Things sacred, is limited by the Rule, which permits to sell them for certain necessary Causes when the Forms of doing it are duly observed ^o.

VIII.

VIII.
Two Sorts of
Exceptions.

Exceptions which are instead of Rules are of two Sorts, some belong to the natural and some to the positive Law, as appears by the Examples in the preceding Article, and by all other Exceptions, every one of which belongs to one or other of these two Kinds.

This is a Consequence from the preceding Article, and from the second of this Section.

IX.

IX.
The Laws
ought to be
known.

All Rules ought either to be known, or at least so expos'd to the publick View of the World, that no Person can act contrary to it with Impunity under Pretence of Ignorance. Thus the natural Rules being immutable Truths, whose Knowledge is essential to Reason, a Man can no more say he is ignorant of them, than that he wants Reason which clearly discovers them. But positive Laws are of no Force, until the Legislator has used the common and sufficient Ways of

^m The Example of general Rules, *Juris præcepta sunt hæc, honestè vivere, alterum non lædere, suum cuique tribuere.* l. 1. § 1. ff. de just. & jur. §. 3. inst. eod. The Example of Rules common to many Matters, *Contractus legem ex conventionem accipiunt.* l. 1. § 6. ff. de pos. As to particular Rules each Title has its own. See l. 2. cod. de rescis. vend.

ⁿ *Simul cum in aliquo vitiosa est [Regula] perdit officium suum.* l. 1. in f. ff. de reg. jur.

^o *Quid tam congruum fidei humanæ quam ea quæ inter eos placuerunt servare?* l. 1. ff. de pact. *Omnia quæ contra bonos mores vel in pactum & in stipulationem deducuntur, nullius momenti sunt.* l. 4. c. de mun. stip. l. 7. § 7. ff. de pact. l. 6. c. cod. *Sancimus nemini licere, sanctissima atque arcana vasa, & vestes cæteraque donaria quæ ad divinam Religionem necessaria sunt — vel ad venditionem, vel hypothecam & pignus trahere — excepta causa captivitatis & famis.* l. 21. c. de sacrosanct. Eccl. See l. 14. & Auth. hoc jus eod.

of Publication; after they are publish'd, they are then look'd upon as known to all the World, and they oblige as well those who pretend to be ignorant, as those who know them ^P.

X.

Positive Laws are of two Sorts; one Sort is that which was originally made, written, and publish'd by those in Authority, such as are the Edicts of Kings in *France*; the other Sort, is that whose Original and first Establishment, do not at all appear, but they have been receiv'd with an universal Approbation by an immemorial Custom among the People, and these are the Laws or Rules which are call'd Customs ^q.

X.
Two Sorts of positive Laws, written Laws and Customs.

XI.

Customs derive their Authority from the universal Consent of People who have receiv'd them when the People had Authority, as in Common-wealths; but in States subject to a Sovereign Prince, Customs have not the Force of Laws but by his Authority. Thus in *France* the Kings have fix'd, reduc'd into Writing, and confirm'd for Laws all Customs, and so have preserv'd to the Provinces, the Laws they had either by the ancient Consent of the People who dwelt in them, or by the Authority of the Princes who govern'd them ^r.

XI.
The Foundation of the Authority of Customs.

XII.

Natural Laws, whose Justice and Authority is always the same, do equally regulate all that is past and all that is to come, which is left undecided ^s.

XII.
Natural Laws regulate what is past, and what is to come.

XIII.

^p *Leges sacratissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi, præscripto earum manifestius cognito, vel inhibita declinent, vel permissa sectentur.* L. 9. Cod. de leg. Constitutiones principum, nec ignorare quempiam, nec dissimulare permittimus. L. 12. Cod. de jur. & fact. ign. Omnis vero populi legibus tam a nobis promulgatis quàm compositis reguntur. § 1. in fine in procem. Inst. Nec in ea re rusticitati venia præbatur, cum naturali ratione honor hujusmodi personis debeat. l. 2. C. de in jus voc.

^q *Constat autem jus nostrum quo utimur aut scripto aut sine scripto, ut apud Græcos, ἢ νόμος ἢ ἔθος, ἢ ἄρχη, i. e. Legum sunt scriptæ aliæ, aliæ non scriptæ. Scriptum autem jus est lex, plebiscitum, senatusconsultum, principum placita, magistratuum edicta, responsa prudentum.* § 3. Inst. de jur. nat. gent. & civ. Sine scripto jus venit quod usus approbavit: nam diuturni mores consensu utentium comprobati legem imitantur. § 9. eod.

^r *Id custodiri oportet, quod moribus & consuetudine inductum est.* l. 32. ff. de legib. In veterata consuetudo pro lege non immerito custoditur: Nam cum ipsæ leges, nulla alia ex causa nos teneant, quàm quod judicio populi receptæ sunt; merito & ea, quæ sine ullo scripto populus probavit, tenebunt omnes. Nam quid interest suffragio populus voluntatem suam declarat, an rebus ipsis & factis. d. l. 32. § 1. ff. de leg. Tam conditor quàm interpret legum solus Imperator justè existimabitur; nihil hac lege derogante veteris juris conditoribus, quia & eis hoc majestas Imperialis permisit. l. ult. in fin. cod. de leg. & const. princ. Communis Reipublicæ sponsio. l. 1. & l. 2. ff. de legib.

Altho' these last Words are spoken of Laws, and not of Customs, yet they agree to Customs as much, or rather more than to Laws. See the Edict of *Charles the VII.* in 1453. Art. 125. and of *Louis the XII.* in 1510. Art 49. for reducing Customs.

^s *Sed naturalia jura quæ apud omnes gentes per æquè observantur, divina quadam providentia constituta, semper firma atque immutabilia permanent.* § 11. Inst. de jur. nat. gent. & civ. Id quod semper æquum ac bonum est. l. 11. ff. de just. & jur.

XIII.

XIII.
Positive Laws
regulate only
what is to
come.

Altho' the Justice of positive Laws be founded on their Usefulness to the Publick, and the Equity of those Motives which gave Occasion to them; yet they have their Authority only from the Law-giver, who determines what they ordain, and they are of no Force until after they have been publish'd to make them known; and these Laws regulate only what is future, but meddle not with any thing that is past^a.

XIV.

XIV.
The Effect of
new Laws
with respect
to what is past.

The Causes which are depending and undetermin'd when new Laws are made, are to be decided by former Laws, unless for some especial Reasons it be expressly provided in the new Laws, that they shall extend to what is past, or they be such as would have serv'd to regulate what is past without this express *Proviso*: As when these Laws do only revive an old Law, or a Rule of natural Equity which had been disused because of some Abuse of it; or when they determine such Questions, for which there is neither any Law nor Custom. Thus, for instance, when the King ordain'd that the Price of Offices should be distributed after the Manner of Mortgages, this Law serv'd as a Rule to all the Suits that were then depending in those Provinces which had no contrary Custom for their Rule^u.

XV.

XV.
Another Effect
of new Laws
with respect
to what is past.

Since new Laws regulate what is to come, they can also, as Occasion requires, change the Effects that otherwise would have follow'd from former Laws; provided always, that no Prejudice be done to the Right of any Person. Thus, for instance, before the Edict of *Orleans*, Substitutions might be made to many Degrees without any Bounds: But that Edict limited Substitutions for the future to two Degrees, besides the first appointed Heir. But because this Edict did not null for the future the Substitutions that were already made, the Edict of *Moulins* reduc'd all the Substitutions to the fourth Degree, besides the first Appointment of an Heir, that had been made before the Edict of *Orleans*; and at the same time

^a *Leges & Constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari.* l. 7. C. de legib.

^u *Leges & Constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari; nisi nominatim & de præterito tempore, adhuc pendentibus negotiis, cautum sit.* l. 7. C. de legib. & const. princ. l. 7. c. de nat. liber. *Sancimus nemini licere sacratissima atque arcana vasa, vel vestes, cæteraque donaria, quæ ad divinam Religionem necessaria sunt, cum etiam veteres leges, ea quæ juris divini sunt, humanis nexibus non illigari sanxerint, vel ad venditionem, vel hypothecam, vel pignus trahere, sed ab his qui hæc suscipere ausi fuerint, modis omnibus vindicari. Hoc obtinente non solum in futuris negotiis, sed etiam in judiciis pendentibus.* l. 21. C. de sacrosanct. Eccles. l. 23. in f. eodem. *Quicumque administrationem in hac florentissima urbe gerunt, emere quidem mobiles res vel immobiles, vel domos extruere, non aliter possunt, nisi specialem nostri Numinis hoc eis permittentem divinam rescriptionem meruerint.* — *Quæ etiam ad præterita negotia referri sancimus; nisi transactionibus vel judicationibus sopita sunt.* l. un. C. de contr. jud. *Quoniam inter alias captiones, præcipue commissoria pignorum legis, crescit asperitas.* — *Siquis igitur tali contractu laborat, hac sanctione respiret. Quæ cum præteritis præsentia quoque repellit & futura prohibet.* l. ult. C. de pact. pign. & de lege com. in pr.

time excepted the Substitutions to which a Right was already acquired, although they were beyond the fourth Degree ^w.

XVI.

Positive Laws begin to be in Force for the future, either from the Time of their Publication, or only after a certain Space of Time which is appointed in them. Thus some Laws which make great Changes, the sudden Execution whereof would be inconvenient, as the Prohibition of some Commerce, the Increase or Diminution of the Value of Money, and other such-like, leave Matters for some Time in the same State they were, and appoint the Time when they shall begin to be observed.

XVI.
Of the time when new Laws begin to be in force.

This is a Consequence from the preceding Rules, and a natural Effect of the Authority and Prudence of the Legislator.

XVII.

Positive Laws, whether they be enacted by a Legislator, or acquire the Force of Laws by Custom, may be abolish'd or chang'd two Ways, either by express Law which abrogates them, or makes some notable Change in them, or by a long Disuse which changes or abolishes them ^x.

XVII.
Two ways of abolishing Laws.

XVIII.

The Use and Authority of all Laws, whether natural or positive, consists in commanding, forbidding, permitting, and punishing ^y.

XVIII.
Divers effects of Laws.

XIX.

The Laws restrain and punish not only what is plainly contrary to the Sense of their Words, but also every Thing, tho' it be not contrary to the Words which does either directly or indirectly oppose their Design, and which is done fraudulently on purpose to evade them ^z. Thus the Laws which forbid Legacies to certain Persons, annul all Disposals made to other Persons appointed to convey the Gifts to those who should not have them.

XIX.
The Laws restrain what is done fraudulently to evade them.

XX.

If the Law forbids, either in general to all Persons, or in particular to some Sort of Persons, some Kind of Agreements, a certain S Commerce,

XX.
The Laws annul or restrain what is done contrary to their Prohibition.

^w *Futuris certum est dare formam negotiis.* l. 7. C. de legib. See the Edict of Orleans, Art. 34. and that of Moulins, Art. 57.

^x *Mutari solent tacito consensu populi, vel alia postea lege lata.* § 11. Inst. de jur. nat. gent. & civ. *Rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.* l. 32. in 1. ff. de legib.

^y *Legis virtus hæc est, imperare, vetare, permittere, punire.* l. 7. F. de legib.

^z *Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem, nec pœnas insertas legibus evitabit, qui se contra juris sententiam, salva prærogativa verborum fraudulenter excusat.* l. 5. C. de legib. *Contra legem facit qui id facit quod lex prohibet: in fraudem vero, qui salvis verbis legis sententiam ejus circumvenit.* l. 29. F. eod. *Fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit; & quod distat, patet dñi diabolus, i. e. dictum à sententia, hoc distat fraus ab eo quod contra legem fit.* l. 30. eod.

Commerce, or makes any other Prohibition whatsoever, every thing done contrary to these Prohibitions, shall either be annul'd or restrain'd, according to the Nature of the Prohibition, and the Violation of it, altho' the Law does not expressly declare the Nullity, and leaves the other Penalties undetermin'd ^a.

XXI.

XXI.
The Laws are general, and not made for one particular Case, or one Person.

The Laws are never made for one particular Person, nor limited to one single Case; but they are made for the common Good, and ordain what is most useful in the ordinary Occurrences of humane Life ^b.

XXII.

XXII.
The Consequence of the preceding Rule.

Since the Laws have a respect to all Cases in general, to which their Design is applicable, they do not particularly declare all the several different Cases; for this Detail, as it is impossible, so it would be useless; but they comprehend generally all Events to which they are design'd for a Rule ^c.

XXIII.

XXIII.
The Equity of the universal Law.

If any Case happen which is not provided for by any known or written Law, it shall be determin'd by the natural Principles of Equity, which is an universal Law, and extends to all possible Cases ^d.

SECT.

^a Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt, lege contrahere prohibente. Quod ad omnes etiam legum interpretationes, tam veteres, quam novellas trahi generaliter imperamus: Ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat; cæteraque quasi expressa, ex legis liceat voluntate colligere. Hoc est, ut ea quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur; licet legislator fieri prohibuerit tantum, nec specialiter dixerit, inutile esse debere quod factum est. Sed si quid fuerit subsecutum, ex eo, vel ob id, quod interdicante lege factum est, illud quoque cassum atque inutile esse præcipimus. l. 5. C. de legib. The Law would be very imperfect, if it should not annul what shall be done contrary to its Prohibitions, and should leave the Violation of them unpunish'd. Minus quam perfecta lex est quæ vetat aliquid fieri, & si factum sit, non rescindit. Ulp. t. 1. § 2. v. l. 63. ff. de rit. nump.

^b Lex est commune præceptum. l. 1. ff. de legib. Fura non in singulas personas, sed generaliter constituuntur. l. 8. ff. eod. Fura constitui oportet, ut dixit Theophrastus, in his quæ ἐπὶ τὸ πλεῖστον, i. e. ut plurimum accidunt, non quæ ἐν ὀλίγοις, i. e. ex inopinato. l. 3. & seq. ff. eod. Ea quæ communiter omnibus profunt, iis quæ specialiter quibusdam utilia sunt, præponimus. Novel. 39. c. 1. See the next Article.

^c Neque leges, neque senatusconsulta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur; sed sufficit ea, quæ plerumque accidunt contineri. l. 10. ff. de legib. Non possunt omnes articuli sigillatim aut legibus aut senatusconsultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet. l. 12. eod. Semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas, & ad eas res pertinerent, quæ quandoque similes erunt. l. 27. eod. See l. 12. c. eod. l. 32. ff. ad legem Aquiliam.

^d Hæc æquitas suggerit, &c. si jure deficiamus. l. 2. § 5. in fin. ff. de aqua & aquæ pulv. arc. Ratio naturalis quasi lex quædam tacita. l. 7. ff. de bon. damnat. Sufficit firmare ex ipsa naturali justitia. l. 13. § 7. de excus. tut.

SECT. II.

Of the Use and Interpretation of Rules.

BY the Use of Rules I understand here the Manner of applying them to the Questions that are to be decided, which Application of the Rules does many Times require the Interpretation of them. The Causes which make it necessary to interpret Laws.

There are two Sorts of Cases wherein it is necessary to interpret Laws. One is, when we find in a Law some Obscurity, Ambiguity, or some other Defect in the Expression; for then it must be interpreted, to discover what is the true Sense of it. And this Kind of Interpretation is confin'd to the Expressions, and gives the Sense of the Words of the Law. The other Case is, when the Sense of a Law, however plain the Words appear to be, leads us to false Consequences, and such Decisions as would be unjust, if it were indifferently applied to all that seems to be compriz'd in the Expression. For then the palpable Injustice which would follow from this apparent Sense, obliges us to discover by some Kind of Interpretation, not what the Law says, but what is the Meaning of it, and to judge by its Design, what is the Extent, and what are the Bounds which the Sense of it ought to have. And this Way of Interpretation depends always upon the Temper which some other Rule gives to the Law that is in Danger of being misapplied, if it be not explain'd: For this Temper gives to the Law both its Use and its Truth. My Meaning will be best understood by some Examples; and to render them more useful to those who have less Knowledge and Experience, I shall give one wherein every one may clearly perceive, that the Law must not always be taken in a literal Sense; and then I shall add another, wherein 'tis not so easy to discern this.

It is a most clear and certain Rule, that a Depositary ought to restore the *Depositum* to him who entrusted him with it, whenever he pleases to demand it back again: But if the Owner of the Silver deposited be a Mad-Man, when he demands his Silver back again, every body knows it would be Injustice to give it to him: For who can be ignorant, that another Rule forbids to give a Mad-Man any thing that may be lost in his Hands, or of which he may make a bad Use, and that to restore it to him is to do him an Injury. Thus by this second Rule the first is interpreted, and its Sense is limited.

'Tis another most certain Rule, that an Heir succeeds to the Rights of the Deceased; but this Rule would be misapplied to the Heir of a Partner in Society, who should pretend to succeed him in his Partnership, for this does not descend to the Heir, which is founded upon another Rule, whereby Partners are mutually to chuse one another; and by this Rule it would be unjust, that the Heir of a Partner should become a Member of the Society, unless the rest agree to it, and he also agrees with them. Thus the second Rule obliges us to interpret the other, and to limit it. And it appears in this second Example, that 'tis not so easy to discover the Principle which gives the Interpretation in this, as in the first, and which gives to each of the Rules its just Effect, and limits the Sense of the former.

It

It appears by these Examples, and will appear farther in all the rest, wherein 'tis necessary to interpret the Sense of a Law, That the Interpretation which gives a Law its just Effect, is always founded upon another Rule, which requires something else than what appear'd to be ordain'd by the mistaken Sense of the first.

The Consideration of Equity is the first way of interpreting Laws.

From this Remark it follows, that for the right understanding of a Rule, 'tis not sufficient to apprehend the apparent Sense of the Words, and to view it by itself alone, but we must also consider whether it is not bounded by other Rules: For 'tis certain that the Justice of one Rule cannot be contrary to that of another, but each hath its own within its proper Extent: And it is only the Relation of them all to one another that makes every one of them just, and bounds their Use; or rather that natural Equity, which is the universal Principle of Justice, makes all Rules, and assigns to each its proper Use. From whence we must conclude, that it is the Knowledge of this Equity, and the general Consideration of this Principle of Laws, that is the first Foundation of the Use and particular Interpretation of all Rules.

The Intention of the Law-giver in positive Laws fixes the Temper of Equity.

This Principle of the Interpretation of all Laws by Equity, does not only respect the natural Laws, but extends also to those that are positive, because they are all founded on the natural Laws, as has been observ'd in Chap. XI, of the Treatise of Laws. But as to what concerns the Interpretation of positive Laws, we must add to this Principle of Equity another Principle which is peculiar to them, and that is the Intention of the Law-giver, which regulates the Use and Interpretation of this Equity. For in this Kind of Laws, the Temperament of Equity is restrain'd to that which can agree with the Design of the Law-giver, and does not extend to every thing that might have appear'd equitable before the positive Law was made. Thus, for instance, when one is so kind as to lend his Money, without taking a Note for the Payment of it, 'tis equitable that he should be admitted to other Ways of proving the Debt, besides that of producing a Note, if the Debtor denies that he receiv'd the Money. And the same Equity requires also the Use of such Proofs in other Kinds of Agreement. But because it is the Interest of the Publick, and Equity obliges us not to minister Occasion to false Witnesses, which are too easy to be had, and every one may easily be inform'd, that when he lends Money, or makes any other Agreement, he should take a Note of it in writing; therefore the Edict of *Moulins*, and that of 1667. which have forbid all Proofs of an Agreement, besides a written Note, if the same be above 100 Livres, have thereby set just Bounds to the Liberty of receiving Proofs of Agreements. And if some Proofs are admitted contrary to the Letter of that Edict, as when some Goods must be deposited in the Hands of others in the Case of a sudden Fire, it is because its Design does not extend to this Case, wherein it was necessary to make the *Depositum*, and impossible to take a Note of them.

Another Example.

Thus for another Instance, how far the Mind of the Law-giver has an Influence upon the Interpretation of positive Laws by natural Equity, 'tis a Rule of this Equity, that a Buyer should not take Advantage of the Necessity of a Seller, to purchase any thing at too low a Price. And from this Principle it would seem to be just, that all those Sales should be annull'd, wherein the Price was a third or fourth

fourth Part less than the just Value, and in some Circumstances, though it be but a fifth or sixth Part less. But the Inconvenience of nulling all those Sales wherein such-like Wrongs occur, gave Occasion to a Law, which restrains the Liberty of dissolving Sales for the Lowness of the Price, to such Sales of immoveable Goods, wherein a Man was defrauded of more than one half of the just Value of the Thing sold. And this Law put an End to all other Use and Application of Equity, as to the Damage in the Price of Sales.

It is not therefore sufficient for understanding that Equity, which is the first Foundation of the Interpretation of Laws, to discover in each Rule, what the Light of Reason finds to be equitable in its Expression, and the Extent it seems to have: But to this Discovery we must join a general Consideration of universal Equity, to discern in the Cases which are to be regulated, whether other Rules do not require a different Kind of Justice, that so we may apply the Rules to such Facts and Circumstances as they agree to, and never pervert any of them from their proper Use. And if they be natural Laws, we must reconcile them by their true Extent and Bounds; but if they be positive Laws, we must fix their Equity by the Intention of the Law-giver.

Divers Considerations necessary for the Interpretation of Laws.

We must take heed that we do not confound these two Kinds of interpreting Laws which we have just now mention'd, with those which are reserv'd to a Prince, which we shall treat of in Article XII. of the next Section. And it will be easy to perceive the Difference between these two Sorts of Interpretations, by the Rules which shall be explain'd in that Section.

SECT. III.

I.

ALL Rules, whether natural or positive, have such a Use, as universal Justice, which is their Design, assigns to each of them. Thus the Application of them is to be made, by discerning what this Design requires, which in natural Laws is Equity, and in positive Laws is the Intention of the Law-giver. And in this Discernment also, the Knowledge of Law does principally consist.

i. The Design of Laws.

II.

If it happens that upon Application of a natural Rule to some Case which it seem'd to include, there follows Decision from thence contrary to Equity, we must conclude that this Rule is misapply'd, and that this Case must be decided by some other. Thus, for instance, the Rule which says, that he who hath lent something to another to make use of it, may take it again whenever he pleases, would produce a Consequence which is contrary to Equity, if he were permitted

ii. Natural Laws are misapplied when such Consequences are drawn from them as are contrary to Equity.

T

permitted

* In omnibus quidem, maxime tamen in jure, æquitas spectanda. l. 90. ff. de reg. jur. In summa æquitatem ante oculos habere debet judex. l. 4. § 1. ff. de eo quod certo loco. Benignius leges interpretandæ sunt, quo voluntas earum conservetur. l. 18. ff. de legib. Mens legislatoris. l. 13. §. 2. ff. de excus. tutor. Scire leges non hoc est verba earum tenere, sed vim, ac potestatem. l. 17. ff. de legib. Ratio naturalis quasi lex quædam tacita. l. 7. ff. de bon. damnat. Jus est ars boni & æqui. l. 1. ff. de just. & jur.

permitted to take the Thing lent back again, while it is made use of for that Purpose for which it was borrow'd, and cannot be taken away without some Damage to the Borrower. For that Rule is null'd in this Case by another, which says, that the Lender should suffer the Borrower to enjoy the Benefit of his Loan, and cannot turn his Favour into an Injury ^f.

III.

III.
Positive Laws
are misapplied
when such
Consequences
are drawn from
them as are
contrary to the
Design of the
Law-giver.

If a positive Law being applied to a Case that seems to be comprehended in it, there follows from hence a Consequence which is contrary to the Design of the Law-giver, then the Rule ought not to be extended to this Case. Thus for Instance, the Edict of *Moulins*, which annuls indifferently all Substitutions for want of Publication without naming the Persons to whom they are made null, does not make void those which concern an Heir that is charged with Substitution; for another Rule obliges this Heir to cause Publication to be made, as being charg'd with executing the Will of the Testator, and 'tis certain no Advantage ought to be made by his Negligence or Knavery ^g.

IV.

IV.
Of the Rigour
of Law.

We must not look upon all Decisions as unjust, and contrary to Equity, or the Design of the Law-giver, which appear to have some Harshness, that is call'd the Rigour of Law, when it is evident that this Rigour is a necessary Consequent from the Law, and that no Mitigation can be given to the Law without destroying it. Thus for Instance, if a Testator having dictated his Testament, and read it over in the Presence of Notaries and Witnesses, and having taken the Pen in his Hand on purpose to sign it, he dies in that Instant; or if after he has sign'd it, it was forgotten to make one of the Witnesses sign it, or lastly, if the Testament wants any of the Formalities prescribed by Law or Custom; this Testament shall be absolutely null, what Certainty soever there be of the Will of the Testator, how favourably soever he has dispos'd of his Goods, because these Formalities are the only Way which the Laws admit for proving the Will of a Testator. Thus the Rigour which nulls all Testaments that want the Forms which the Laws prescribe, is essential to these Laws, and to moderate the Rigour would be but to destroy the Laws ^h.

V.

V.
The Mitiga-
tion of the Ri-
gour of Law.

If the Harshness or Rigour of a Law be not a necessary Consequent from the Law, and inseparable from it, but the Law may have its

^f *Ubi æquitas evidens poscit, subveniendum est.* l. 183. ff. de reg. jur. *In omnibus quidem, maxime tamen in jure æquitas spectanda est.* l. 90. eod. *Intempestive usum commodatæ rei auferre non officium tantum impedit, sed & suscepta obligatio inter dandum accipiendumque.* l. 17. § 3. ff. Commod. See Article 1. to Sect. 3. of a Loan for Use.

^g *Et si maxime verba legis hunc habent intellectum, tamen mens legislatoris aliud vult.* l. 13. § 2. ff. de excus. tut. See the Edict of *Moulins*, Art. 57. and that of *Henry II.* in 1553. Art. 4. de *Sophistica legum interpretatione & cavillatione.* See l. 12. § 3. c. de ædif. priv.

^h *Quod quidem perquam durum est, sed ita lex scripta est.* l. 12. § 1. ff. qui & a quib. man.

its Effect by an Interpretation which moderates that Rigour, and by some Mitigation which Equity, that is the Design of the Law, requires; then we must prefer Equity to that Rigour which the Letter of the Law seems to exact, and rather follow the Spirit and Design of the Law, than that narrow and harsh way of interpreting it ^l. Thus in Case a Testator appoints, that if his Wife, whom he leaves big with Child be brought to Bed of a Son, he shall have two Thirds of his Estate and she one Third; but if she brings forth a Daughter, the Mother and Daughter shall equally divide the Inheritance between them: Now if she happens to have both a Son and a Daughter at a Birth, the Rigour of the Law seems to exclude the Mother, because she was not nam'd to any Part of the Estate in the Case which happens; but Equity requires, that since the Father had a Mind the Mother should have a Share in his Estate whether she had a Son or a Daughter, and had given her one half of what the Son was to have, and an equal Share with the Daughter, that the Intent of this Will should be observ'd and executed in the best Way that is possible, and that for this Reason the Son should have one Half, and the Mother and Daughter should have each a Fourth ^k. Thus for another Instance, If a Father and Son die at the same Time, as in a Battel, and 'tis not possible to know which of them surviv'd the other; and if the Widow being Mother to this Son, demands against the Heirs of the Father, the Estate which should fall to the Son by Succession to his Father, if it were certain that the Son did survive him; the Rigour of the Law in this Case would exclude the Mother, because the Father and Son dying both together, it does not appear that the Son surviv'd, and consequently it cannot be said, that he succeeded to his Father; and therefore the Estate of the Father must go to his Heirs. But Equity requires that in this doubtful Case, it should be presum'd in Favour of the Mother, that the Father dy'd first, as by the Order of Nature he should ^l.

As to this second Instance we must remark, that it is not to be understood but only of such Goods, to which Mothers succeed according to the Edict of Charles IX. commonly call'd, The Edict of Mothers.

VI.

^l *Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quàm stricti juris rationem.* l. 9. c. de judic. *Benignius leges interpretandæ sunt, quo voluntas earum conservetur.* l. 18. ff. de legib. *Etsi maximè verba legis hunc habent intellectum, tamen mens legislatoris aliud vult.* l. 13. § 2. ff. de excus. tut. *Hæc æquitas suggerit, etsi jure deficiamus.* l. 2. § 5. in f. ff. de aqua & aquæ plu. arc. *Ubi cunque judicem æquitas moverit.* l. 21. ff. de inter. *Naturalem potius in se quam civilem habet æquitatem, siquidem civilis deficit pectio, sed natura æquum est.* l. 1. § 1. ff. de his qui test. lib. *Benignorem interpretationem sequi, non minùs justius est quam tutius.* l. 191. § 1. ff. de reg. jur. *Semper in dubiis benigniora præferenda sunt.* l. 56. eod. *Rapienda occasio est quæ præbet benignius responsum.* l. 168. eod.

^k *Si ita scriptum sit, si filius mihi natus fuerit, ex bese hæres esto, ex reliqua parte uxor mea hæres esto; si verò filia mihi nata fuerit, ex triente hæres esto, ex reliqua parte uxor hæres esto: Et filius & filia nati essent, dicendum est assen distribuendum in septem partes, ut ex his filius quatuor, uxor duo, filia unam partem habeat. Ita enim secundum voluntatem testantis, filius altero tanto amplius habebit quam uxor; item uxor altero tanto amplius quam filia. Licet enim subtilis juris regulæ conveniebat, ruptum fieri testamentum, attamen cum ex utroque nato Testator voluerit uxorem aliquid habere, igitur ad hujusmodi sententiam, humanitate suggerentis decursus est.* l. 13. ff. de lib. & post.

^l *Cum bello pater cum filio periisset, materque filii, quasi postea mortui, bona vindicaret, agnati vero patris, quasi filius ante periisset; Divus Hadrianus credidit patrem prius mortuum.* l. 9. § 1. ff. de reb. dub.

VI.

VI.
When we
must follow ei-
ther the Equi-
ty or the Ri-
gour of a Law.

From the preceding Rules it follows, that it cannot be fix'd as a general Rule, either that the Rigour of Law should always be follow'd against the Mitigations of Equity, or that we should always recede from the Rigour: But the Rigour becomes unjust in such Cases wherein the Law will admit of an equitable Interpretation; and, on the contrary, it is a just Rule in such Cases, wherein that Interpretation would do Violence to the Law. Thus the Rigour of Law may be taken either for a Harshness that is unjust and odious, and which is not agreeable to the Design of the Laws; or for a Rule that is inflexible, but withal is just. And we must never confound the Use of these two Ideas; but so distinguish them as to apply either a just Severity or an equitable Mitigation, according to the preceding Rules, and those that follow.

This Article is a Consequence from the preceding Rules.

VII.

VII.
No Man is at
liberty to fol-
low either the
Rigour or E-
quity of a Law.

It is never left at liberty as a Thing indifferent to chuse either the Rigour of the Law, or the Equity of it, so that one may in the same Case apply either the one or the other as he pleases, without Injustice. But in every Fact he must determine himself either to the one or the other, according to Circumstances, and the Design of the Law. Thus we must judge by the Rigour of the Law, if the Law will not admit of any Mitigation; or by an equitable Mitigation, if the Law will admit of it.

This Article is also a Consequence from the preceding Rules.

VIII.

VIII.
When we are
to follow the
Rigour of the
Law, upon the
Account of its
Equity.

Although the Rigour of the Law seems to be distinguish'd from Equity, and they appear to be even opposite to one another; yet 'tis always true, that in such Cases wherein this Rigour is to be follow'd, another Consideration of Equity makes it just. And as it can never happen that what is equitable is contrary to Justice, so neither can it happen, that what is just is contrary to Equity. Thus in the Example of the IVth Article, 'tis just that the Testament should be annul'd, where the Formalities are wanting which the Law prescribes, because an Act of that Consequence ought to be accompanied with solemn Circumstances and firm Proofs of its Truth. And this Justice has its Equity, because the publick Good, and the Interest even of Testators, and chiefly those that are sick, requires, that none should easily take that for their Will, which was not well ascertain'd to be intended by them.

This Article is also a Consequence from the preceding Rules.

IX.

IX.
The Interpre-
tation of the
obscure ambi-
guous Passages
in a Law.

The Obscurities, Ambiguities, and other Faults of Expression, which may render the Sense of a Law doubtful, and all other Difficulties of understanding and applying the Laws aright, ought to be resolv'd

solv'd by the most natural Sense, *viz.* that which relates most to the Subject, which is most agreeable to the Design of the Law-giver, and which is most favour'd by Equity. And this Sense is discover'd by divers Considerations of the Nature of the Law, its Reason, its Relation to other Laws, the Exceptions which may limit it; and such-like other Reflexions which discover the Design and Sense of the Law ^m.

X.

To understand aright the Sense of a Law, we must weigh all its Terms, and the Preamble to it, if there be any, and so judge what it ordains by its Reasons and the whole Series of Matters contain'd in it; and we must not limit its Sense by that which may appear different from its Design, or by a dismember'd part of the Law, or by a Fault in one Expression: But we must prefer to the strange Sense of a faulty Expression, that which otherwise appears evident by the Design of the whole Law. Thus he offers Violence to the Rules and Design of Laws, who does either for Judgment or Advice, make use of one part of a Law detach'd from the rest, and perverts it to another Sense than what its Connexion and Relation to the Whole does assign it ⁿ.

X.
To interpret
a Law by its
Reasons and
its Tenor.

XI.

If in any Law there be an Omission of one Thing that is essential to the Law, or what is a necessary Consequence of its Appointment, and which tends to give the Law its entire Effect, according to its Reason; in this Case what is wanting in the Expression may be supplied, and the Appointment of the Law may be extended to that which is comprized in its Design, though it be wanting in the Terms ^o.

XI.
How the O-
mission of a
Law is to be
supplied.

XII.

If the Words of a Law do plainly express the Sense and Design of it, we must hold to them; but if the true Sense of a Law cannot be sufficiently understood by the Interpretations that may be made of it, according to the Rules already explain'd, or when the Sense is clear, there arise great Inconveniences from it contrary to the publick

XII.
When we must
have Recourse
to a Prince for
the Interpre-
tation of a
Law.

U

^m In ambigua voce legis ea potius accipienda est significatio quæ vitio caret, præsertim, cum etiam voluntas legis ex hoc colligi possit. l. 19. ff. de legib. Quoties idem sermo duas sententias exprimit, ea potissimum accipiatur quæ rei gerendæ aptior est. l. 67. ff. de reg. jur. Prior atque potentior est quam vox mens dicentis. l. 7. in f. ff. de supell. leg. Benignius leges interpretandæ sunt, quo voluntas earum conservetur. l. 19. ff. de legib. Scire leges non hoc est verba earum tenere, sed vim ac potestatem. l. 17. cod. See the Articles 1, 2, 3, of this Section, and those which follow.

ⁿ Incivile est nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ, judicare, vel respondere. l. 24. ff. de legib. Verbum ex legibus, sic accipiendum est, tam ex legum sententia quam ex verbis. l. 6. § 1. ff. de verb. sign. Etsi maxime verba legis hunc habent intellectum, tamen mens legislatoris aliud vult. l. 13. § 2. ff. de excus. tut. See the preceding Articles; see upon the Word Preamble, the Law 134. § 1. ff. de verb. obl.

^o Quod legibus omissum est, non omittetur religione judicantium. l. 13. ff. de testib. Quoties lege aliquid unum vel alterum introductum est, bona occasio est, cætera quæ tendunt ad eandem utilitatem, vel interpretatione, vel certe jurisdictione suppleri. l. 13. ff. de legib. Supplet prætor in eo quod legi potest. l. 11. ff. de præf. verb. Licet orationis sub divo Marco habitæ verba deficiant, is tamen qui post contractas nuptias nurui suæ curator datur, excusare se debet, ne manifestam sententiam ejus offendat. l. 17. C. de excus. tut. Edicti quidem verba cessabunt; Pomponius autem ait sententiam Edicti porrigendam esse ad hæc. l. 7. § 2. ff. de jurisd.

lick Good; then we must have Recourse to the Prince, to learn of him his Design, as to that part of the Law which may be subject to *Interpretation, Declaration, or Mitigation*; either to give us the right Understanding of the Law, or to temper its Rigour with Equity ^p.

Thus the Parliament made a Remonstrance to Charles the VIIth about the Declarations, Interpretations, Modifications, which were to be made of the ancient Edicts, whereupon that of 1446. was added.

Thus the Edict of Moulins, Art. 1. and that of 167. T. 1. Art. 3. and Art. 7. appoint the Parliaments and other Courts to make their Remonstrances to the King, as to what may be found in the Edicts contrary to the publick Good and Convenience, or subject to Interpretation, Declaration, or Mitigation. See Art. 33. of the Edict of Philip VI. in 1349. giving Power to the Council, and Chamber of Accounts, to make the Interpretations and Declarations which were to be made of this Edict.

De Interpretatione Canonum Ecclesiasticorum si quid dubietatis emerferit. l. 6. de sacrosanct. Eccl.

XIII.

XIII.
We must follow the Law, altho' the Reason of it be unknown.

When the Purport of a Law is well known tho' the Reason of it is unknown, if some Inconvenience appears to arise from it which cannot be avoided by a just Interpretation, it must be presum'd that the Law is in other respects useful and equitable, upon the Account of promoting some publick Good, which should induce us to prefer its own Sense and Authority to the Reasonings that may be brought against it: For otherwise many Laws very useful and well-grounded, would be overturn'd either by other Considerations of Equity, or by Subtilty of Arguments ^q.

XIV.

XIV.
Favourable Laws are to be extended.

The Laws which favour what concerns the publick Benefit, Humanity, Religion, the Liberty of Agreements and of Testaments, and which other such-like Reasons render favourable, and those which are made in favour of some Persons, ought to be interpreted with all that Extent, which the Favour of these Reasons join'd with Equity, can allow them; and they ought not to be interpreted harshly, nor

^p *Leges sacratissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi, præscripto earum manifestius cognito, vel inhibita declinent, vel permissa seclentur. Si quid vero in iisdem legibus latum, fortassis obscurius fuerit, oportet id ab imperatoria interpretatione patefieri, duritiemque legum nostræ humanitati incongruam, emendari. l. 9. cod. de leg. Inter æquitatem jusque interpositam interpretationem, nobis solis & oportet & licet inspicere. l. 1. eod. Si enim in præsentis leges concedere soli imperatori concessum est, & leges interpretari solo dignum imperio esse oportet. l. ult. eod. Nov. 143. De his quæ primo constituuntur, aut interpretatione, aut constitutione optimi principis certius statuendum est. l. 11. ff. eod.*

^q *Non omnium quæ a majoribus constituta sunt, ratio reddi potest. l. 20. ff. de legib. Et ideo rationes eorum quæ constituuntur inquiri non oportet, alioqui multa ex his quæ certa sunt subvertuntur. l. 21. eod. Disputare de principali judicio non oportet. l. 3. c. de crim. sacril. Multa jure civili contra rationem disputandi, pro utilitate communi recepta esse innumerabilibus rebus probari potest. l. 51. § 2. ff. ad l. Aquil.*

nor apply'd after such a Manner as turn to the Prejudice of those Persons whom they were design'd to favour^r.

XV.

The Laws which restrain natural Liberty, as those which forbid what is not in it self unlawful, or otherwise derogate from common Right, the Laws which enact the Punishment of Crimes and Faults, or Penalties in Civil Matters, those which prescribe certain Formalities, the Rules which seem to have some Harshness, those which permit disinheriting, and others of the like Nature are so to be interpreted, that they may not be applied by any Consequences drawn from them to such Cases as were never intended to be included: And on the contrary, all the Mitigations of Equity and Humanity which they can admit of are to be allow'd^r.

XV.
What Laws
are to be re-
strain'd.

This is a Consequence from the preceding Rules.

XVI.

If any Law or Custom be establish'd upon particular Considerations against other Rules, or against common Right, it ought not by any Consequence to be applied to other Cases, besides that which is expressly contain'd in it. Thus the Edict which forbids to receive any Proof of Agreements, if the Sum be above an hundred Livres, and the Proof of Facts different from that which was agreed upon, does not extend to Facts of another Nature, where there is no such Thing as an Agreement^r.

XVI.
What Laws
are not to be
extended be-
yond what
they expressly
ordain.

XVII.

The Favours and Grants of Princes are to be interpreted favourably, and ought to have all that just Extent, which the Presumption

XVII.
The Grants of
Princes are to
be favourably
interpreted.

^r *Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos durior interpretatione contra ipsorum commodum producamus ad severitatem. l. 25. ff. de legib. Aliam causam esse institutionis quæ benigne acciperetur. l. 19. ff. de lib. & post. Propter publicam utilitatem—Strictam rationem insuper habemus, nonnunquam in ambiguis religionum quæstionibus omitti solet. Nam summam esse rationem quæ pro religione facit. l. 43. ff. de relig. & sumpt. funerum. Quod favore quorundam constitutum est, quibusdam ad læsionem eorum nolumus inventum videri. l. 6. c. de legib. Legem enim utilem reipublicæ adjuvandam interpretatione. l. 64. § 1. ff. de condit. & dem.*

^r *Interpretatione legum pœnæ molliendæ sunt potius quam asperandæ. l. 42. ff. de pœn. In pœnalibus causis benignius interpretandum est. l. 155. § ult. ff. de reg. jur. In levioribus causis proniores ad lenitatem judices esse debent, in gravioribus pœnis severitatem legum cum aliquo temperamento benignitatis subsequi. l. 11. ff. de pœn. v. l. 32. ff. eod. Aliam Causam esse Institutionis quæ benigne acciperetur; exheredationes autem non essent adjuvandæ. l. 19. ff. de lib. & post. Si ita libertatem acceperit ancilla, si primum marem pepererit, libera esto: & hæc uno utero marem & fœminam peperisset, si quidem certum est quid prius edidisset, non debet de ipsius statu ambigi utrum libera esset necne; sed nec filia, nam si postea edita est, erit ingenua; sin autem hoc incertum est, nec potest, nec per Judicalem potestatem manifestari in ambiguis rebus humaniorem sententiam sequi oportet, ut tam ipsa libertatem consequatur quam filia ejus ingenuitatem, quasi per præsumptionem priore masculo edito. l. 10. § 1. ff. de verb. dub. Quod contra rationem juris receptum est, non est producendum ad consequentias. l. 14. ff. de legib. In quorum finibus emere quis prohibetur, pignus accipere non prohibetur. l. 24. ff. de pig. Altho' the Example of this Slave be related in this Law, 10. § 1. ff. de reb. dub. upon the Subject of Testaments, yet it may also be applied here.*

^r *Quod contra rationem juris receptum est, non est producendum ad consequentias. l. 141. ff. de reg. jur. l. 14. ff. de legib. See l. 39. ff. eod.*

ption of a Liberality natural to Princes can assign them, provided they be not extended after such a Manner as does a Prejudice to other Persons^u.

XVIII.

XVIII.
The Laws in-
terpret one an-
other.

If the Laws wherein there is any Doubt or other Difficulty, have some Relation to other Laws, which can clear up their Sense, we must prefer before any other Interpretation that which the other Laws give a Light into. Thus when the new Laws have a Relation to the old, or to old Customs, or the old Laws have a Relation to the new, one of them is to be interpreted by the other, according to their common Intention, except where the latter have abrogated some Parts of the former^w.

XIX.

XIX.
The Laws are
interpreted by
Custom.

If the Difficulties which may happen in the Interpretation of a Law or Custom, may be explain'd by an ancient Usage which has fix'd their Sense, and which is confirm'd by a continued Series of uniform Decisions, we must adhere to the Sense declar'd by Usage, which is the best Interpreter of Laws^x.

XX.

XX.
When the Cu-
stoms of the
neighbouring
Places, and
those of the
principal Ci-
ties serve for
Rules to other
Places.

If some Provinces or Places want certain Rules to resolve the Difficulties in some Matters that are there used, and these Difficulties are not regulated either by the Law of Nature, or any written Law, but depend upon Customs and Usages, they are to be regulated by such Principles as follow from the Customs of the same Places. And if these do not resolve the Difficulty, we must follow the Determination that is made of such Matters by the Customs of the neighbouring Places, and chiefly by those of the principal Cities^y.

XXI.

XXI.
The Laws ex-
tend to that
which is abso-
lutely necessa-
ry to their
Design.

All Laws extend to that which is essential to their Design. Thus, whereas the Laws permit Males at the Age of fourteen Years com-pleat, and Maids at the Age of twelve to marry, it is a Consequence from these Laws, that those who marry can bind themselves, though Minors, in Contracts of Marriage, which concern the Portion, the Dowry, the Community of Goods, and such-like other Things. Thus

^u *Beneficium Imperatoris, quod à divina scilicet ejus indulgentia proficiscitur, quam plenissime interpretari debemus.* l. 3. ff. de conc. princip. *Si quis à principe simpliciter impetraverit, ut in publico loco ædificet, non est credendus sic ædificare, ut cum incommodo alicujus id fiat.* l. 2. § 16. ff. ne quid in loco publ. fiat. See l. 2. C. de bon. vac.

^w *Non est novum ut priores leges ad posteriores trahantur.* l. 26. ff. de legib. *Sed & posteriores leges ad priores pertinent, nisi contrariæ sint, idque multis argumentis probatur.* l. 28. eod.

^x *Si de interpretatione legis quærat, imprimis inspicendum est, quo jure civitas retro in ejusmodi casibus usa fuisset, optima enim est legis interpretis consuetudo.* l. 37. ff. de legib. *Nam Imperator noster Severus rescriptis, in ambiguitatibus, quæ ex legibus proficiscuntur, consuetudinem, aut rerum similiter judicatarum auctoritatem, vim legis obtinere debere.* l. 38. eod.

^y *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus & consuetudine inductum est. Et si qua in re hoc deficeret tunc quod proximum & consequens ei est. Si nec id quidem appareat, tunc jus quo urbs Roma utitur, servari oportet.* l. 32. ff. de legib.

Thus the Judges being appointed to do Justice, their Authority extends to all Things that are necessary for the Exercise of their Functions; such as the Right of restraining by Penalties those that resist the Orders of the Court; and the same is to be said of all other Consequences of their Administration^a.

XXII.

In Laws of *Permission*, the Consequence from the greater to the less holds good. Thus he that has a Right to give away his Goods, has much more a Right to sell them. And after the same Manner, those who have a Right to appoint Heirs by a Will, have much more a Right to give Legacies^a.

XXII.
The Laws which permit greater Matters are to be extended to the less.

XXIII.

In *forbidding* Laws, the Consequence holds good which is drawn from the lesser to the greater Matters. Thus Prodigals who are forbidden to manage their Estate, are much more forbidden to alienate it. Thus those who are declar'd unworthy of any Office or any Honour, are much more unworthy of a very great Office and a very considerable Honour^b.

XXIII.
The Laws which forbid lesser Matters are to be extended to the greater.

XXIV.

This extending of Law by Consequences drawn from the lesser to the greater, and from the greater to the lesser Matters, is limited to those Things which are of the same Kind with what the Law disposes of, or such as the Reason of the Law extends to, as in the Examples mention'd in the preceding Articles^c. But no Consequence is to be drawn from greater to lesser, or from lesser to greater Matters, when they are Things of a different Kind, or such as the Design of the Law is nowise applicable unto. Thus the Law which permits young Persons to engage in Marriage, and oblige their Estates for making good the Agreements which are the Consequences of it, although they be Minors, would be misapplied to other Kinds of Agreements, although less important. Thus the Liberty which a Person has in his Minority, to dispose of his Estate after Death by his Will, cannot be understood of a Liberty to give away Part of his Estate while he is alive. Thus the Power of a Judge will not infer that he has the Power of a Jaylor or Bailiff. Thus

XXIV.
An Exception to the two preceding Rules.

X

the

^a *Hæc æquitas suggerit, & si jure deficiamus. l. 2. § 5. in f. de aqua & aquæ pluvi. ar. cend. Edicti quidem verba cessabunt: Pomponius autem ait, sententiam edicti porrigendam esse ad hæc. l. 7. § 2. ff. de jurisd. Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit. l. 2. eod.*

^a *Non debet cui plus licet, quod minus est non licere. l. 21. ff. de reg. jur. Cujus est donandi, eidem & vendendi & concedendi jus est. l. 163. ff. de reg. jur. Qui potest invitis alienare, multo magis & ignorantibus, & absentibus, potest. l. 26. ff. de reg. jur. See the two next Articles.*

^b *Qui indignus est inferiore ordine, indignior est superiore. l. 4. ff. de senatorib. Est enim perquam ridiculum eum qui minoribus pœnæ causa prohibitus sit, ad majores aspirare. l. 7. § ult. de interd. & releg. l. 5. ff. de serv. except. See the next Article.*

^c *In eo quod plus sit semper inest & minus. l. 110. ff. de reg. jur. Cum quis poterit alienare, poterit & consentire alienationi. l. 165. eod. Lex Julia quæ de dotali prædio prospexit, ne id marito liceat obligare, aut alienare, plenius interpretanda est; ut etiam de sponsa idem juris sit quod de marito. l. 4. ff. de fundo dot.*

the Laws which set a Mark of Infamy upon some Persons, are not to be applied to the depriving them of their Estate, although Reputation is of more Worth than an Estate.

Thus in the ancient Roman Law, the Licence which the Fathers had to take away the Lives of their Children, did not extend to the Licence of depriving them of Liberty, and making them Slaves. Libertati à majoribus tantum impensum est, ut patribus quibus jus vitæ in liberos, necisque potestas olim erat permessa, libertatem eripere non liceret. l. ult. C. de patr. potest. Thus in the same Roman Law, a Man was permitted to give to his Concubine, but not to his Wife, See the Law. 58. & tot. Tit. ff. de donat. inter Vir. & Uxor. Thus in the same Law the Husband was permitted to sell the Inheritance that came by his Wife, if she consented to it, but not to mortgage it, although she should consent to it. Lex Julia fundi dotalis Italici alienationem prohibebat fieri à marito non consentiente muliere: Hypothecam autem, nec si mulier consentiebat. l. un. 15. C. de rei uxor. act.

XXV.

XXV.
Some tacit
Prohibitions
are included
in Laws.

If a Law puts an End to the Enquiry after some Abuse pardoning what is past; this were in effect to forbid for the future^d.

The Law would be imperfect if it connived at what is past, and did not add a Prohibition for the future. Thus the Edict of 166. which remitted the Enquiry after those who had taken Interest for the Obligations upon a Loan, and converted them into Rents, did not fail to forbid such Interest for the future. See Nov. 154.

XXVI.

XXVI.
How Right ac-
crues to some
Persons by the
Laws.

When a Right comes to any Person by the Appointment of Law, this Right accrues to him as the Effect of that, whether the Person knows, or does not know the Law, and also whether he knows or does not know the Fact upon which the Right which the Law gives him depends. Thus the Creditor, whose Debtor happens to die, acquires a Right against the Heir, altho' he doth not know of the Death of his Debtor, and when he does not so much as know that the Law obliges the Heir to pay his Debts to whom he succeeds. Thus the Son is Heir to his Father, tho' he be ignorant of his Right to succeed him, and doth not know of the Death of his Father. And it is a Consequent from this Rule, that the Rights of this Nature which accrue to Persons by Virtue of the Law, are convey'd to their Heirs if the Persons happen to die, before they have known or made use of their Right^e.

This

^d Cum lex in præteritum quid indulget, in futurum vetat. l. 22. ff. de legib.

^e Cum evidentissime lex 12. tabularum hæredes huic rei [æri alieno defuncti] faciat obnoxios. l. ult. c. de hæred. act. Item vobis acquiritur quod servi vestri ex traditione nanciscuntur, sive quid stipulentur, sive ex donatione vel ex legato, vel ex qualibet alia causa acquirant. Hoc enim vobis ignorantibus, & invitis obvenit. § 3. Inst. per quas pers. nob. acq. Si infanti, i. e. Minori 7. annis in potestate patris, vel avi, vel proavi constituto, vel constituto hæreditas sit derelicta, vel ab intestato delata a matre, vel linea ex qua mater descendit, vel aliis quibuscumque personis, licebit parentibus ejus sub quorum potestate est adire ejus nomine hæreditatem, vel bonorum

This Rule must be understood as it is express'd, of Rights acquir'd by the Appointment of a Law, and not in general, of what is acquir'd by other Ways which the Laws authorize, as when a Legacy is acquir'd by the Will of a Testator. On this Rule depends that of our Customs, Death gives Possession to the Living, which signifies that the Heirs by Blood acquire a Right to the Succession, altho' they know not the Death of him to whom they succeed, because it is the Law that entitles them to the Succession. But Legatees and Testamentary Heirs, being entitled only by the Will of the Testator, and not by the Law, their Right is not the same.

XXVII.

All Persons capable of using their Rights, are at Liberty to renounce what the Laws appoint in their Favour. Thus one that is of full Age being under no Incapacity, such is Madness, or an Interdict, may renounce a Succession to which the Law entitles him. Thus those who have Privileges granted them, either by the Law, or by particular Grace, are free to refuse and not make use of them^f: But this Liberty of renouncing their Right does not extend to those Cases wherein three Persons are concerned, nor to these wherein the Renunciation of his Right would be contrary to Equity or good Manners or to the Prohibition of some Law.

XXVII.
How we may renounce a Right that accrues by a Law.

XXVIII.

The Effect of the Law is in no wise dependent on the Will of private Persons. And no Man can hinder neither by his Agreements nor by his Disposals in his last Will, or by any other Way, but the Laws will regulate his Concerns. Thus a Testator cannot hinder by any Precaution, but the Laws will have their Effect against these Disposals which are made contrary to them. Thus the Agreements which are contrary to Rules are of no Force^g.

XXVIII.
The Disposals of private Persons cannot hinder the Effect of a Law.

The

bonorum possessionem petere. Sed si hoc parens neglexerit, & in memorata ætate infans decesserit, tunc parentem quidem superstitem, omnia ex quacunque successione ad eundem infantem devoluta jure patrio, quasi jam infanti quæsitæ capere. l. 18. c. de jur. de liber. v. l. 5. ff. Si pars hæred. pet. l. 30. § ff. 6. de acq. vel om. hæred. Prætor ventrem mittit in possessionem. d. l. § 1. & Tit. de vent. in poss. mitt. Testamento jure factis multis institutis hæredibus, & invicem substitutis, adeuntibus suam portionem; etiam invitis cohæredum repudiantium accrescit portio. l. 6. c. de impub. & ab. subst. Illud sciendum est, si mulier prægnans non sit, existimatur autem prægnans esse, interim filium hæredem esse ex asse quamquam ignoret se ex asse hæredem esse. l. 5. ff. si pars hæred. pet. & de l. § 1. l. 30. & 6. ff. de acq. vel om. hæred. Ignorans hæres sit. l. 3. § 10. ff. de suis eleg. v. l. un. c. de his qui ante ap. tab.

^f *Regula est juris antiqui omnes licentiam habere, his quæ pro se indulta sunt renunciare. l. 51. c. de episc. & cler. l. 29. c. de pact. Licet sui juris persecutionem aut spem futuræ perceptionis deteriore constitutur. l. 46. ff. de pact. v. l. 4. § 4. ff. si quis caut. l. 8. ff. de transfact. Venditor fundi Geroniani, fundo Botroiano quem retinebat, legem dederat, ne contra eum piscatio Thynnaria exerceatur. Quamvis mari, quod naturæ omnibus patet, servitus imponi privata lege non potest, quia tamen bonæ fidei contractus, legem servari venditionis exposcit; personæ possidentium aut in jus eorum succedentium, per stipulationis vel venditionis legem obligantur. l. 13. ff. comment. præd. See Art. next, & Art. 2. of § 4. Of the Faults of Agreements.*

^g *Jus publicum privatorum pactis violari non potest. l. 38. ff. de pact. l. 20. ff. de religiosis. Privatorum Conventio juri publico non derogat. l. 45. § 1. ff. de reg. jur. Frater cum hæredem sororem scriberet, alium ab ea, cui donatum volebat, stipulari curavit, ne Falcidia*

The Novel 1. c. 2. in f. permits Testators to deprive their Heirs of the Falcidia: But this Permission itself observes, that otherwise their Disposal had been of no Force, as being contrary to a Law, which requires that the Heir should have at least the Falcidia, which is the fourth Part of the Estate.

We must not give to the Rule explain'd in this Article an Extent which has any thing contrary to the preceding Article.

XXIX.

XXIX.
A discerning
Mind and
comprehen-
sive Know-
ledge necessary
for the good
Use of Rules.

From all the Rules which have been explain'd under this Title, we may conclude with this at the last, that there is Danger lest we misapply the Rules of Law, if we want a large extensive Knowledge of their Detail, and of the different Considerations necessary for interpreting and applying them ^b.

Thus we must take Heed lest we apply a Rule beyond its just Extent, to such Matters as it has no Relation to: and take notice of the Exceptions which limit the Rules; and either keep ourselves to the Letter of the Law, or interpret it according to the Rules explain'd under this Title, and observe the other Remarks about them.

cidia uteretur: Et ut certam pecuniam, si contra fecisset, præstaret. Privatorum cautione, legibus non esse refragandum constitit & ideo sororem jure publico retentionem habituram, & actionem ex stipulatu denegandam. l. 15. § 1. ff. ad leg. Falc. Nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus subsequutum, qui contrahunt, lege contrahere prohibente. l. 5. c. de legib.

^b *Omnis definitio in jure civili est periculosa; parum est enim ut non subverti posset. l. 202. ff. de leg. jur.*

A NEW
INSTITUTE
OF THE
IMPERIAL
OR
CIVIL LAW.

With NOTES,

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other Observations, how the *Canon* Law,
the Laws of *England*, and the Laws and
Customs of other *Nations* differ from it.

In FOUR BOOKS.

Composed for the Use of some Persons of Quality.

The Fourth Edition corrected.

By *THO. WOOD*, LL. D. Rector of *Hardwick, Bucks*,
COMMISSARY and OFFICIAL of that Archdeaconry.

Turpe est Patricio, & Nobili, & causas Oranti, Jus, in quo versaretur, ignorare.
D. 1. 2. 43.

Impp. Theod. & Valen.

Si Juris-periti laudabilem in se probis moribus vitam esse monstraverint, si docendi peritiam, facundiam dicendi, interpretandi subtilitatem, copiamque differendi se habere patefecerint; & Cætu Amplissimo judicante digni fuerint æstimati, &c. placuit Honorari, & His qui sunt ex vicariâ dignitate Connumerari. C. 12. 15.

INSTITUTE

IMPERIAL

CIVIL LAW

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the Principles of Law
the Laws of England, and the Laws
Customs of other Nations

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Esq.

T H E P R E F A C E.

THE Civil Law hath been justly esteemed for its Rules of Reasoning, and for its equitable Decisions upon the Controversies of private Property. It was from hence that the Writers upon the Laws of Nature and of Nations have had their Materials to raise those immortal Works, which have adorn'd the learned World almost ever since its Establishment.

The Romans borrow'd Part of this Knowledge from the Greeks; vast Experience, Multiplicity of Affairs, Variety of Questions and Controversies occasion'd its Increase, and the greatest Wits from all Parts following the Court of a victorious Nation were employ'd to bring it to a farther Perfection.

It is very observable that Infidels and Heathens compos'd the greatest Part of this Scheme of Equity and Justice; and that those Nations who were never conquer'd by the Romans (as the Germans and Scots) freely embrac'd this Law, and that it remains amongst other Nations after they were deliver'd from the Power which impos'd it.

For since the Decay of the Roman Greatness, this Law hath been receiv'd in several Monarchies and Commonwealths, as agreeable to all Forms of Government; it being calculated only for private Affairs, and touching lightly on publick Matters.

Indeed above Five Hundred Years together it lay almost suppress'd in Europe, with other Arts and Sciences; but this did not diminish its Reputation, for like Truth it broke out at last and prevail'd; but like Truth too, which generally appears with a Mixture of Error, it wanted a refining from some Subtleties, and in some Particulars, which seem'd contrary to Humanity and Justice. Upon this Account it is not receiv'd at this Day in any one Nation without Additions or Alterations. Sometimes the Feudal Law is mix'd with

with it, or general and particular Customs. Sometimes Ordinances and Statutes lop off a great Part of it.

^a Duck de autoritate Juris Civilis, lib. 1. cap. 2. num. 6. & authores ibi citati.

^b Idem.

^c Maranta J. Arnono. &c. Different. 1.

The ^a Turks make use only of the Justinian Greek Code.

In ^b Italy the Canon Law and Customs have driven away part of it. In Venice Custom hath almost and absolute Government. In the Milanese the Feudal Law and particular Constitutions bear the Sway. In ^c Naples and Sicily the Constitutions and the Laws of the Lombards are said to have the upper hand.

^d Duck, &c.

^e Groenwegen de Legibus Abrog. in proem.

^f Duck, &c.

^g Idem.

In ^d Germany and Holland it is indeed esteem'd to be the Municipal Law, but many Parts of it are obsolete amongst them, and other Parts are alter'd either by the Canon Law, or a different Usage. In ^e Friezland it is observ'd with more Strictness; but in the Northern Parts of Germany the ^f Jus Saxonicum, Lubecense, or Culmense is preferr'd before it.

In ^g Denmark and Sweden the Civil Law hath little or no Authority.

^h Idem & Les Loix Civiles dans leur ordre naturell. 1. Tome, p. 72. second Edit.

^h France has receiv'd Part of it only; and that Part in some Places is a Customary Law, and in the Provinces nearest to Italy the Municipal written Law. But Part of the Canon Law (which does not contradict the Liberties of the Gallican Church) and Ordinances (with particular Customs of the Provinces sometimes contrary to one another) concur to make up the whole Body of that Law. In Criminal Causes the Civil Law is more regarded; except that manner of Trial both in Criminal and Civil Causes is regulated by Ordinances and Edicts.

ⁱ Les Loix Civiles, Tome 2. p. 404.

^k Duck, &c.

In ^k Spain and Portugal the Jus Regium and Customs correct the Civil and Canon Law.

^l Mackenzy's Institutes of the Laws of Scotland, p. 4. & 5.

In ^l Scotland the Statutes and Acts of Sederunt, Part of the Regiam Majestatem (supposed to be compiled by our Glandvill) and their Customs contrroll it.

Amongst us in England the governing Law is founded upon general and particular Customs and Acts of Parliament; and some of these Customs have been taken from the Civil and Canon Laws, and those Statutes are oftentimes drawn upon a Platform borrow'd from both those Laws to regulate inconvenient Usages or other Defects. But we reject the Civil and Canon Law when it contradicts the Jus Coronæ, the Common Law, or our Acts of Parliament.

Thus far only hath the Civil Law prevail'd in Europe, and thus far have other Nations deviated from it. But when I compare it, as it is receiv'd in other Nations, with the Common Law of England, it must be acknowledg'd that the Laws of this Nation (as they are now mix'd and temper'd) suit admirably to the Genius of our People. For they have set prudent Bounds to the Power of our Princes, and secured a proper Liberty for the Subject. They are very particular and certain. Precedents and adjudg'd Cases have been preserv'd for many Ages, to direct in the Determination of most Points; so that an Arbitrary Judge has less Room to exert himself here, than in any other Law.

The English Law seems to have been suited originally for Temporal Affairs only, and for Times of Peace. But to supply that Defect, the Civil and Canon Laws have been call'd in to complete it, and have serv'd as Auxiliaries.

For Part of the Canon Law has been receiv'd in our Ecclesiastical Courts for the Government of the Church.

The High Constable and Earl Marshal take Cognizance of Martial Affairs and Military Discipline (as well as of Causes relating to Heraldry) by some Rules of the Civil Law. The Court of Admiralty is guided by some other Parts of it, with the Laws of Oleron and the maritime Constitutions in the Consolato del Mare, for Matters arising upon the Sea, and relating to Sea Affairs. All this together make up our Common Law; and though it runs down through different Channels, yet every Part of it (even that in the Spiritual Courts) may claim the Name of the Common Law of England. For the Whole is a Composition of the Feudal, Civil, and Canon Laws; and its Definitions, Divisions, and Maxims are drawn out of one of those three Laws.

Some particular Customs relating to Descents of Inheritances make a Difference between the Civil Law and some Parts of the Common Law; for the Succession to personal Estates is evidently the same. The Terms, the Form of Pleading, and the Manner of Trials by Juries deceive Men into an Opinion that the Civil Law stands upon another Foundation. But you will see the Relation between them when you consider that the Common Law originally gave no methodical Account of Things purely rational; as of Obligations, Contracts, Crimes, Trespases, Last Wills and Testaments, Judicature, or the

^m Preface to
the 3^d Rep.

ⁿ H. Vultei
Jurisp. Rom.
Contracta.

Nature of other humane Acts; and that our Lawyers have borrowed the Rules and reasoning Part from the Civil Law, though many of them are apt to think that it was all their own from the Beginning, because they have Possession, and find it at present in their Books. ^m They are told that this was deliver'd down to them from their Druids; but Fleta and Bracton, and the most ancient of their Writers would look very naked if every Roman Lawyer should pluck away his Feathers. Of late my Lord Coke hath frequently, and in exprefs Terms made use of the Maxims of the Civil and Canon Laws, and hath taught the Way of arguing from such Rules to others. But Mr. West having occasion in his Book of Precedents to give a general Account of Obligations, Contracts, Offences, &c. has unskilfully epitomiz'd and translated the Account from ⁿ Herm. Vultei, and passed it off for the pure Common Law of England.

Our Chancery or Court of Equity has borrow'd the very Method of Trial from the Civil Law. The Complaint is by Bill, which amounts to a Libel without particular Positions and distinct Articles. The Defendant makes an Answer in Writing to it, but sets forth his Defence too in his Answer, which has shortned the Civil Law Practice. There are Replications, Exceptions, Interrogatories, Witnesses privately examin'd, a Publication of their Depositions, a Sentence or Decree in Writing by a Judge without the Verdict of a Jury, as in the Practice of the Civil Law; and if Occasion requires, there may be an Appeal in Writing, to the Upper House of Parliament.

But if there is that wide Difference between the Common and Civil Laws in their Forms of Pleading and Manner of Trial, this is only the Style, Practice, and Course of the Courts. I contend that there is a Mixture in the Principles, Maxims and Reasons of these two Laws; and indeed the Laws of all Countries are mixed with the Civil Law, which have arriv'd to any Degree of Perfection. Even the Civil and Canon Laws do not agree in every Instance of Practice, or in their Rules, Decisions and Decrees in every Point. But though all the Lineaments or Features are not the same, yet there is such a Composition in the Canon Law which gives it almost one and the same Complexion with the Roman Law, and the same Blood runs in both their Veins, that at
3 least

least you may know them to be near of Kin. True it is that the Common and Civil Laws had not the same Root or Stock; yet by inoculating and grafting, the Body and Branches do seem at this Day to be almost of a Piece. For the English Law has receiv'd great Alterations, and is very much unlike itself; or (as Mr. Selden expresses it) In regard of its first Being it is like the Ship, that by often mending hath no Piece of the first Materials.

Notes on For-
tescue, &c. p.
19.

Upon a Review, I think it may be maintain'd, that a great Part of the Civil Law, is Part of the Law of England, and interwoven with it throughout. I hope therefore that the Study of it may be encourag'd amongst us as in other Nations; not only to support the Professors of it, but for the better understanding of the Common Law of England; and that the Laws of other Kingdoms may be known to us; or that those Rules of Argument (on which at least the private Affairs of Property depend) may farther instruct our Gentry to serve the Publick in foreign Negotiations as well as in Council at Home. If we do not understand the Terms which are frequently made Use of in the Affairs of other Nations, they will be apt to despise us; for our Character often rises and sinks in the Judgment of the Common People according to the Figure which those Persons make which we send amongst them. And as Princes are not exempt from the Prejudices which attend on humane Nature, so the Reputation of Wisdom and Knowledge (which sometimes follows our Embassadors) does often insensibly prevail, when a formal Repetition of their Instructions concurr'd very little to the Success.

To encourage young Scholars to spend some few Hours in the Study of the Civil Law, I have endeavour'd to make the Institutes more useful than those of Justinian, or the common Systems. For I have lightly run over those Titles, where a strict Examination would be to no rational Purpose; as Servitude, Manumission, the Paternal Power of the Romans, Adoption, Usufructs, Substitutions, the Difference and Quality of Heirs, the Fidei-commissum, Lex Falcidia and Trebellanica, Bonorum-possessio, Stipulation, Actions, &c. And I have enlarg'd on those Heads which are more diverting and instructive, fighting Matters of Practice and useless Knowledge, and giving Reasons for most Determinations. By the Way I have added Notes, and therein observ'd the

the chief Differences of the Laws of England, as also the Principal Differences in the Laws and Practice of other Nations from it, and what Conformity or Disagreement there is in the Law Divine; what Alterations have been made in the Canon Law, &c. that our young Gentlemen may be led to compare the Equity and Policy of each, and be able hereafter to judge what ought amongst ourselves to be Confirm'd or Reform'd. I think that this Knowledge too may not be useless to young Divines, there being very often good Directions to determine Cases of Conscience.

In the Second Impression I made some Alterations and Additions; especially by inserting the Latin Definitions and Rules at the Bottom of each Page under their proper Heads; which are collected by others without any Method. These short and general Rules will fix those Things in the Memory which are treated of at large; the English Rules giving some Light to the understanding of those that are subjoin'd in the Original. You will find that both of them will be of use to suggest a ready Determination of a doubtful Question, which might not otherwise occur without Search or Study. These Additions seem'd so necessary, that I could not satisfy myself I had publish'd a compleat System, without taking into my Compass the most useful Laws under the Titles De Verborum significatione, and De Regulis Juris, with some Gleanings of that Nature from other Places; being almost of Opinion with a most ^o learned Lawyer, that these General Notions ought to be learn'd before the Institutes are taken in hand, or before one sets about a more particular Enquiry.

^o Corasius de
Arte Juris, c. 6.

Now this Performance in respect only of the Civil Law and the Laws of England, is a Work of a different Nature from that compos'd in Latin by the learned Dr. Cowell. His chief Design was to give an Institute of the Laws of England, according to the Method of the Imperial Institutes: My Intent is to compile an Institute of the Imperial Laws in a less obscure, and in a more comprehensive Way than that collected by Tribonian, &c. Dr. Cowell shews some Differences and Agreements in the Civil Law by an Institute of the Laws of England in Justinian's Method; I have shewn some Disagreements in the Laws of England, by Way of Notes added to a New System of the Civil Law. His Institute is founded much upon the old Law of Wards and Liveries, Tenures in Capite,

Capite, and Knight Service, since taken away and destroy'd, and upon other Laws since thrown off; whereas my Endeavour has been to adapt my Observations on the Laws of England to the present Establishment. But I follow him when I maintain, that the Laws of England are a Composition of the Civil, Canon, and Feudal Laws, and that there is a greater Affinity or Union between them, than the Professors of the Civil and Common Laws do generally apprehend.

Amongst other Opportunities which I had for this Undertaking, I can say with my Lord Coke, "That during my Study of the Laws of this Realm (the Common, Civil, and Canon Laws) the Courts of Justice were furnish'd with Men of excellent Judgment, Gravity, and Wisdom:" whom I attended for some Years with great Application, and have had the Honour to learn from them. Under these Advantages another Person might have made Improvements, and publish'd something of this Nature to the World worth its Notice.

Preface to the
1st Institute.

THO. WOOD.

An Explanation of the Marginal Quotations from the Civil Law.

- I. 1, 2, 3 & 4. { **T**HE *Institutes* of *Justinian*, 1st Book, 2^d Title, 3^d and 4th §, Section or Paragraph.
 D. 1. 1. pr. Or, { The Digest, 1st Book, 1st Title, Pr. in principio. Or,
 D. 1. 2. 3 & 4. Or, { The Digest, 1st Book, 2^d Title, 3^d and 4th Laws. Or,
 D. 1. 1. 1. 4. { The Digest, 1st Book, 1st Title, 1st Law, 4th Paragraph.
 C. 1. 12. 8. 2. { The Code, 1st Book, 12th Title, 8th Law, 2^d §, Section or Paragraph.
 Nov. 89. c. 9. The *Novels*, Constitution the 89th, Chap. 9th.

N. B. That another Way of Citing from the *Civil Law*, is by the initial Words of the *Law* and *Paragraph* with the Title; adding sometimes the *Number* of the *Law* and *Paragraph*.

An Explanation of the Method of Citing from the Canon Law.

- 1^{ma} Pars Decreti. { 1. *dist.* (or 1. *d.*) *c. Lex.* or *c. 3. Lex.* or 1. *dist. Lex.* omitting *c.* for Canon.
 2^{da} Pars Decreti. { 3. (*Subaudi Causa*) *quæst.* or *q. 9. c. Caveant.* or *c. 2. Caveant.* or *Caveant.* leaving out *c.* and the Number of the Canon.
 In the 33^d Cause there is a particular Method, as thus — *de Pœnitent. dist. Homicidiorum*, or *can. Homicid. Caus. 33. de Pœnit. dist. 1.*
 3^a Pars Decreti. { *De Consecr. dist. 2. can. Quia Corpus.* Or thus — *can. Quia corpus 35. dist. 2. d. Consecr.*
 Decretales. { *De Offic. & Potest. Judic. Deleg. c. cum Contingat*, or thus, — *Extra. 36. De Offic. & Potest. Jud. Deleg.* or thus — *c. cum Contingat, 36. X. de Offic. & Potest. Jud. Del. X.* signifies *Extra Decretum*, and is sometimes omitted.
 Sextus Decretal. { *Extr. de Rescriptis c. Dispendia*, in 6. or *lib. 6.* or in *Sexto*, or thus, — *c. Dispendia 3. de Rescript. in 6.*
 Clementinæ. { *Clem. 1. de Sent. & re Judic.* or *d. Senten. & re Judic. ut Calumniis in Clement.* or *c. ut Calumniis, 1 de Sent. & R. J.*
 Extravagantes. { *Extravag. Ad Conditorem. Joh. 22. de V. S.* or *Verborum Signific. Extravag. Commun. c. Salvator. de Præbend.*

Sometimes the Difference of *Joh. 22.* or *Commun.* is omitted.

N. B. That the *Distinctions* in the *Decretum* are noted with a small *d*, to distinguish them from *D*, Digest, and that the Canon or Chapter is pointed at with a small *c*, to distinguish it from *C*, Code. — *c.* in the *Decrees* most properly signifies *Canon*; but in the *Decretals*, *Chapter*.

A NEW
INSTITUTE
OF THE
Imperial or Civil LAW.

With NOTES,
Shewing in some principal Cases (amongst
other Observations) how the *Canon Law*,
the Laws of *England*, and the Laws and
Customs of *other Nations* differ from it.

THE
INTRODUCTION.

*Of Justice: Of the Law of Nature: Of the Law of Nations,
and of the Civil Law: Of written Laws, and unwritten,
i. e. Custom: Lastly, Of Equity.*

THE Law is an Art directing to the Knowledge of Justice. ^a D. 1. 1. princ.

I. Justice is universal or particular. * Universal Justice ^{Of Justice.} is a constant and perpetual Desire of giving to every one his Due; and hath for its Rule all Laws divine or humane. Particular Justice is a constant and perpetual Will of giving every one his Due, according to particular Agreement, or the Laws of Civil Society. The Subject then of the Law is Civil Society, and the End of it particular Justice.

^b Particular Justice, as it is exercis'd in Commerce, is called ^b I. 1. 1. commonly Commutative or Expletory Justice, directed without any Regard to the different Conditions of Men, and observes a simple Proportion.

^a Jus est ars boni & æqui. D. 1. 1. Juris prudentia est Divinarum atque Humanarum rerum notitia, justî & injusti scientia. l. 1. 1. 1.

^b Justitia est constans & perpetua voluntas suum cuique tribuendi. l. 1. 1. pr. d. 1. 1. 10. Juris præcepta sunt hæc; honeste vivere, alterum non lædere, suum cuique tribuere. l. 1. 1. 3.

Proportion. As it is exercised in *Governing* and *Beneficence*, it is called *Distributive* or *Attributive Justice*, which does appoint Rewards and Punishments, according to the several Conditions, Stations and Qualities of Men; and if there are many Claims, it observes a *comparative Proportion*.

Commutative or *Expletory Justice*, is wholly intent upon the Value and Price, or what is due; but *Distributive* or *Attributive Justice* is directed to a Person as he is more or less useful and worthy, and no otherwise.

^c D. 1. 1. 9. Justice is to be learned by considering the Law of ^c Nations and the *Civil Law*, *i. e.* the Law of each Commonwealth.

The Law of Nations must be distinguish'd into the *Original* or *Primary Law*, and the *Consequential* or *Secondary Law* of Nations. For Law is to be applied only to Man who is capable of it, not to Brutes who are govern'd by Instincts and Inclinations; as Self-preservation, a Propensity to Generation, to eat, sleep, &c. which cannot be any Foundation for Justice.

^d I. 2. 1. II. The ^d *Original* or *Primary Law* of Nations, or the Law of natural Man, is that which unimprov'd Reason has planted amongst all Men, and is the true *Law of Nature*; a discerning Principle in Men of Good and Ill; or the Dictate of right Reason, declaring from its Conformity or Disagreeableness every Action to be good or evil. Its *Object* is natural Good or Evil; but the Will or Choice being determin'd, then it is a *moral* Good or Evil. It always forbids or commands, as other Laws. The Author of Reason is the Legislator. Rewards and Punishments arising from a quiet or unquiet Conscience, are the Sanction, and do constantly attend it.

From this Description observe, that what is *praternatural*, or a *Permission* and *Right* of Reason and Nature, or natural *Inclination* or *Instinct*, and all other Things vulgarly call'd *natural*, or said to proceed from Nature, are different from the true *Law of Nature*.

^e I. 2. 11. The *Original* or *Primary Law* of Nations, or *Law of Nature*, has one eternal Mark upon it, *viz.* ^c *Immutability*. I mean by that, that the Law of Nature is *essential* to the well-being of Society. As Man is in a Society, the Law of Reason and Nature cannot continually take place, but upon a Supposition. For it does not enjoin me to buy or sell; but upon the Supposition that I will buy or sell, it does require of me that I should not deceive or defraud. But as there is scarce a general Rule without Exceptions, so this Proposition, *The Law of Nature is immutable*, or, *The Law of Nature is essential to Civil Society*, lies under some Restrictions.

It is immutable or essential in its *general Principles* and *Injunctions*; not but that it may be otherwise in some Circumstances and remote *Conclusions* from it. As it is a general Injunction, that we must not enrich ourselves by another's Loss or Damage; that we ought to observe our Promises, &c. But this being found inconvenient in the *general Observance*, it is allow'd, that one may enrich

^d Quod naturalis Ratio inter omnes homines constituit; id apud omnes peræque custoditur, vocaturque Jus Gentium. I. 1. 2. 1.

Quod semper æquum & bonum est, Jus dicitur, ut est Jus naturale. D. 1. 1. 1.

^e Naturalia Jura semper firma atque immutabilia permanent. I. 1. 2. 11.

rich himself in the particular Case of Prescription upon another Man's Right, and that Minors may chuse whether they will stand to their Promises. It is mutable then in part only, and cannot wholly be changed without destroying the Order of Society; as no State can sublist under a general Licence to kill and steal. This is the common State of the Question. But the Law of Nature ought to be observ'd in every Part of it, though by reason of Inconveniences, Civil Polity takes the Liberty to make Allowances.

III. The ^f *Consequential* or Secondary Law of Nations, or the *Law of Nations* properly so call'd, is that which does *proceed* from natural Reason, but not so simply and immediately as the Original and Primary Laws. They are deduced by long Experience and Practice, from a Consideration of the Nature of Society, and from an Enquiry into the Dispositions of Mankind. Necessity or Conveniency was the Cause of them.

The Law of Nations.
f I. 1. 2. 1.

They are divided into two general Branches.

The *first* was the Appointment of distinct Properties; from whence arose Kingdoms, Cities, Commerce, Contracts.

The *second* Branch carried *Rewards* and *Punishments*; and from thence Magistracy, Dignities, Courts of Judicature, War, Bondage, &c.

IV. The ^s *Civil* Law is that Law which every Commonwealth or City has establish'd and appointed peculiarly for itself. This may be call'd the Arbitrary or Municipal Law; for it is not of that Necessity or Extent with the Law of Nations, which is observ'd almost by all Mankind. From these two Laws, *viz.* the Law of Nature, and the Law of Nations, the *Roman* Law was compiled, and is emphatically call'd, *The Civil Law*. Upon which Account, several Things which were originally and by Invention the Law of Nations, are become Parts of the Civil Law by a new Establishment and Approbation. The *twelve* Tables were the Foundation of the *Roman* Law; which after the Expulsion of *Tarquin* were brought from *Athens* and other *Grecian* Cities.

The Civil Law.
§ I. 1. 2. 1. & 2.

The whole Civil Law is compriz'd in four Books, the *Code*, the *Pandects* or *Digest*, the *Institutes*, the *Novels* or *Authenticks*.

The *Code* is divided into twelve Books, and was the first Book which the Emperor *Justinian* order'd to be collected (for the most part) out of the Constitutions of the former Emperors dispersed in the *Gregorian*, *Hermogenian*, and *Theodosian* Codes. There are only some Fragments left of the two first, but the *Theodosian* is entire. The *Code* of *Justinian* came forth in the Year of our Lord 529.

The *Digest* or *Pandects* came forth in the Year 529, and is divided into fifty Books. It was collected from the Commentaries of the ancient Lawyers, their Responses and other Writings.

B b

The

^f *Jus Gentium est, quod usu exigente & humanis necessitatibus gentes humanae sibi constituerunt.* I. 1. 2. 1.

^s *Jus Civile est, quod quisque populus sibi constituit.* I. 1. 2. 1.

Jus Civile neque in totum a Naturali vel Gentium Jure recedit, nec per omnia ei servit. D. 1. 1. 6.

The *Institutes* came out also in the Year 533, and is divided into four Books. It is a System of the whole Body of Law. But not so *distinct* and *comprehensive* as it might be, neither so useful at this Day as at first. The *Institutes* sometimes correct, or are contrary to the *Digest*, but the second Publication of the *Code* came after them; in which some things are omitted, which the *Institutes* refer to from the first Publication.

Last of all, the *Novels* or *Authenticks* were published at several Times without any Method. They are called *Novels*, because they are *new* Laws; and *Authenticks*, because they are exactly and *authentically* translated from the *Greek* into the *Latin* Tongue.

^h D. 1. 3. 1.
& 2.

^h A Law is the Precept of the supreme Power, (or Power derived from it) obliging the Subject to act or not to act under a Penalty.

ⁱ D. 1. 3. 1.

ⁱ Its Force and Efficacy does appear in commanding, forbidding, permitting, punishing. It does always command or forbid; for tho' it may be a Precept of *Permission*, it commands the Judges to admit those Things permitted; and tho' it may be a *Privilege*, exempting him whose Privilege it is from the Obligation of the Law, yet it forbids others to act contrary or derogatory to it.

A Law obliges all but the *Prince*; and Kings or their *Embassadors* who abide amongst us, because they have a Parity of Power.

This is the Definition of Law *largely* taken; but in its *strict* Sense (as it is a *written* Law of the *Romans*) it is defined to be:

^k I. 1. 2. 4.

1. That which the People of *Rome* hath established upon the Recommendation or Request of a *Senatorian Magistrate*: So the other Parts ^k of the written Law, are,

^l Ibid.

2. ^l A *Plebiscite*, which the common People enacted at the Request of the *Tribune*, or other *Plebeian Magistrate*.

^m I. 1. 2. 5.

3. ^m A Decree of the Senate.

ⁿ I. 1. 2. 6.

4. The Constitution of the Emperor; either by a ⁿ *Rescript* (which is the Letter of the Emperor in answer to particular Persons who enquire the Law of him; but if it is sent to a Corporation or Body of Men that have consulted him, his Letter then is called a ^o *Pragmatick Sanction*) or by ^p *Edict*, which the Emperor establishes of his own accord, that it may be generally observed by every Subject; or by ^q *Decree*, which the Emperor pronounces upon hearing a particular Cause between Plaintiff and Defendant.

^o C. 1. 23.

^p C. 1. 14. 3.

^q D. 1. 4. 1.

^r I. 1. 2. 6.

But if at any Time a *Constitution* is *special*, it is called a ^r *Privilege* (*privata Lex*) which is particularly established for the sake of a certain *Person* or *Thing* upon a particular Account. If it is granted to a ^s *Person*, it dies with him; if to a *Thing*, (suppose to an Estate, that it shall never pay Taxes, &c.) it passes down to the Successors, and continues while that *Thing* is in Being.

^s D. 50. 17.
196.

^t C. 10. 52. 6.

If a *Privilege* is granted to ^t *Scholars*, it is granted to their Wives and Children.

By

^h Lex est commune præceptum, virorum prudentium consultum, delictorum quæ sponte vel ignorantia contrahuntur coercitio, communis Reipub. sponso. D. 1. 3. 1. Lex est præscriptum ad quod omnes qui in Repub. sunt, vitam instituere debent. D. 1. 3. 2.

ⁱ In omnibus causis id observatur, ut ubi personæ conditio locum facit beneficio, ibi, deficiente eâ, beneficium quoque deficiat. D. 50. 17. 68. Privilegia quædam causæ sunt, quædam personæ; & ideo quædam ad Heredem transmittuntur, quæ causæ sunt; quæ personæ sunt, ad Heredem non transeunt. D. 50. 17. 196.

By the way, note, That a Privilege may be made not only for a Man's Advantage, but to his *Disadvantage* and against him; as when a Punishment more severe than ordinary is inflicted upon an Offender for Example sake and *in Terrorem*. But here I do not understand Privilege in the *vulgar* Sense, but in its proper Meaning, as it is a *particular* Constitution contrary to a *general* Law.

^v All this Power of issuing forth his Pleasure by Rescripts, Edicts, ^v D. 1. 4. pr. and Decrees; was given to the Prince by the *Lex Regia*; wherein the People of *Rome* submitted themselves wholly to the Government of one Person, *viz.* *Julius Caesar*, after the Defeat of *Pompey*; or to *Augustus* after the Death of *Julius*. By this it came to pass that the Prince alone could not only make Laws, but was esteemed above the ^u coercive Powers of them.

5. The ^u *Edicts* of the *Prætors*, or the *Jus Honorarium*, was also ^u I. 2. 17. 8. Part of the written Laws, which the *Prætors* or such kind of Magistrates did propose by the Consent of the People. Their Business was to interpret the Law by *Equity*, and to mitigate the Rigour of it. As their Office was *annual*, so at first were their Interpretations, till the *Cornelian* Law made their *Edicts* perpetual. ^u I. 1. 2. 7.

6. Lastly, There were the ^v *Answers* or *Opinions* of the *Lawyers*, ^v I. 1. 2. 8: who had an *Authority* to interpret, and from whose Declarations the Judges at that Time could not recede.

Tho' now there is no such Necessity to follow the Decision of the later Doctors.

Note, That these were the several Ways of making Laws amongst the Romans. Other Nations have a Method peculiar to themselves; as here in Great Britain and Ireland, Laws are made by the King (or Queen) and the Parliament. And so every City has its own Method of making Laws by the Grant of the King for the good Government of the Place.

V. The Civil Law is either written or unwritten. The ^u *Writ-* Of Written Laws. ten Law is either publick or private. ^u I. 1. 1. 4.

Publick which immediately regards the State of the Commonwealth, as the Establishment of Things relating to Religious Persons, the Enacting and Execution of Laws, the Consultations about War and Peace, &c.

Private, that more immediately has respect to the Concerns of every particular Person, and is that written Law which we design to treat of.

These Rules are to be observed concerning written Laws.

^a 'Tis dangerous to depend on the general Rules, by reason of ^a D. 50. 17. many Limitations and Exceptions. ^{202.}

^b Subsequent Practice is a good Interpreter of an ambiguous Law. ^b D. 1. 3. 37.

^c Laws are made with Reference to Cases that shall hapen for the ^c C. 1. 24. 7. future only, and must not comprehend Actions that are past before their

^a Omnis Definitio in Jure Civili periculosa est. D. 50. 17. 202.

^b Optima Legum interpretis consuetudo. D. 1. 3. 37.

^c Leges & Constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari; nisi nominatim & de præterito tempore & adhuc pendentibus negotiis cautum sit. C. 1. 24. 7.

their Establishment; unless it is enacted that they shall comprehend a past Action.

^d D. 1. 3. 20.

^d The Reason of every Law cannot be assign'd.

^e D. 50. 17.
141.

^e Particular Privileges are not to be cited as Precedents against the Rules of Law.

^f D. 1. 3. 3.

^f Laws ought to be made upon Cases that often happen, and not rare and accidental Occurrences.

^g D. 1. 3. 17.

^g The proper Sense of a Law is not so much in its *Literal* Sense, as in the *Reason* of it and *Design*.

^h D. 1. 3. 10.
cum seq.

^h Seeing every *Circumstance* cannot be comprehended in a Law, the Defect must be supplied by a natural *Interpretation* or the *Authority* of the Judge, and extended to *like* Cases that have been *omitted*.

ⁱ D. 1. 3. 23.

ⁱ New Constructions must not be put upon ancient Laws.

^k D. 1. 3. 26.

^k The former Laws must give place to the latter; and are to be corrected and determin'd by them.

^l D. 1. 3. 26.

^l Those Laws that are made in Favour of any Person, ought not to be interpreted to his Disadvantage.

Though there is a Difference betwixt a Law that *prohibits* only, and the Law that makes the Act *void*; inasmuch as the Prohibition may exert its Force by Penalties, ^m yet no Act is valid that is against a Law, but is utterly void, though not declar'd to be so by special Words.

^m C. 1. 14. 5.

Vide tamen Suarez. *de Legib.* lib. 5. c. 5. &c. Grot. *de J. B.* lib. 2. c. 5. n. 16.

ⁿ D. 50. 17.
56.

In ⁿ Doubtful Cases the most merciful Interpretation is to take place.

^o D. 50. 17.
110. 1.

^o Where Words are in the Disjunctive, it is sufficient if one Part is true.

P A

^a Non omnium, quæ à majoribus nostris constituta sunt, Ratio reddi potest. D. 1. 3. 20.

Multa in Jure communi contra rationem disputandi pro utilitate communi recepta sunt. D. 9. 2. 51. 2.

^c Quod contra rationem Juris receptum est non est producendum ad consequentias. D. 50. 17. 141. In rebus novis constituendis evidens utilitas esse debet ut recedatur ab eo jure quod diu æquum visum est. D. 1. 4. 2.

^f Jus constitui oportet in his quæ ut plurimum accidunt, non quæ ex inopinato. D. 1. 3. 3. Quod semel aut bis existit prætereunt Legislatores. D. 1. 3. 6.

^g Scire leges non hoc est verba earum tenere, sed vim & potestatem. D. 1. 3. 17. Non est dubium in Legem committere eum qui verba Legis amplexus contra Legis nititur voluntatem. C. 1. 14. 5.

^h Cum in aliqua causa sententia Legis manifesta est, qui jurisdictioni præest ad similia procedere, atque ita Jus dicere debet. D. 1. 3. 12. Ubi eadem Ratio, idem Jus.

ⁱ Minime sunt mutanda quæ Interpretationem certam semper habuerunt. D. 1. 3. 23.

^k Non est novum ut priores leges ad posteriores trahantur. D. 1. 3. 26.

^l Nulla Juris ratio aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate Hominum introducuntur, ea nos durior interpretatione contra ipsorum commodum producamus ad severitatem. D. 1. 3. 26.

^m Ea quæ Lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur; licet Legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est. C. 1. 14. 5.

ⁿ Semper in dubiis benigniora præferenda sunt. D. 50. 17. 56. Semper in obscuris quod minimum est sequimur. D. 50. 17. 9. In re dubia benigniorem interpretationem sequi non minus justius est quam tutius. D. 50. 17. 192. 1.

^o Ubi verba conjuncta non sunt, sufficit alterutrum esse verum. D. 50. 17. 110. 1.

- ^p A Restraint to a particular Thing destroys general Words. ^p D. 50. 17. 80.
^q A Law that pardons what is past, forbids it for the future. ^q D. 1. 3. 22.
^r Of two Evils or Inconveniences the least is to be chosen, or that which is least prejudicial. ^r D. 50. 17. 200.
^s Laws made for the publick Good cannot be set aside by private Agreements. ^s D. 50. 17. 45. 1.
^t He that makes the Law ought to interpret it, if doubtful. ^t C. 1. 14. 12. 1.
^u It is not sufficient that Laws are made, but it is necessary that they should be *promulged* too, before they oblige. ^u Nov. 66.

In England Laws are not promulged, for there to an Act of Parliament, every Man in Judgment of Law is Party; as being present by his Representative. Dr. and Student. l. 1. c. 46. 1. Inst. 333. a. 2. Inst. 526. 3. Inst. 41.

- ^w The Act of Law can do no Wrong. ^w D. 47. 10. 13. 2.
The *Unwritten Law* is what we call *Custom*, introduced by the ^x tacit Consent of the People only, without any particular Establishment. ^y The Authority of it is great, seeing it is so far approved, that it wants not to be put into Writing. ^z It is equal with a written Law, if it is wholly uninterrupted by contrary Acts, and is of a long Continuance. ^a But if ever it hath been judicially allow'd, the Custom will be so much the rather supported. ^a D. 1. 5. 34. 1. 5. 36. 2. D. 1. 5. 32. 1.

Some will have it, that a Custom shall prevail by ten Years Continuance only, when it does not contradict any written Law; if it does, the Custom must be proved to be Time out of mind. Others, that ten Years Custom shall abolish a Civil Law, but that it must be forty Years to prevail over a Canon Law. Others yet say, that the Determination of the Time must be left to the Judge, after he has considered the Nature of the particular Cases before him. The latter Opinion prevails in Practice. Menoch. l. 20. de Arbit. qu. 81. Perez. in Cod. de Consuet. *In England Custom must be Time out of mind; so that if the Original is known (be it never so ancient) it is not to be esteem'd a Custom.* 1 Inst. 114. b.

Above all Things, ^a Custom must be reasonable, and not against ^b a natural or divine Law. ^b D. 1. 3. 39. & C. 8. 54. 2.

The Custom therefore that stolen Goods shall be given to the Exchequer, and not to the Owner, is condemned.

I said, it was the Consent of the People that introduced a Custom;
C c and

^p In toto Jure generi per speciem derogatur. D. 50. 17. 80.
^q Cum Lex in præteritum quid indulget, in futurum vetat. D. 1. 3. 22.
^r Quoties nihil sine captione investigari potest, eligendum est quod minimum habet iniquitatis. D. 50. 17. 200.
^s Privatorum Conventio Juri publico non derogat. D. 50. 17. 45. 1. Utilitas publica præfertur contractibus privatorum. C. 12. 63. 3.
^t Cujus est Legem condere, ejusdem est Legem interpretari. C. 1. 14. 12. 1.
^u Constitutiones nostræ valent ex quo in communi factæ sunt manifestæ. Nov. 66.
^w Juris executio non habet injuriam. D. 47. 10. 13. 2.
^x Sine scripto Jus venit, quod usus approbavit; nam diuturni mores consensu utentium comprobati Legem imitantur. I. 1. 2. 9.
Omne Jus aut Consensus fecit, aut Necessitas constituit, aut firmavit Consuetudo. D. 1. 3. 40.

^c D. 1. 3. 32. and this is unquestionable, if the ^c People have Power to make a Law, and are a free State.

That any Custom should be proved to be at first introduced by all the People, or the major part, I cannot think it reasonable; for after this manner, the Proof of a Custom would be almost impossible. These usual Questions therefore are impertinent, viz. Whether a Custom did begin bona fide? Whether a Custom can be introduced by a Woman, by a Minor, by one Man? &c. The main Thing to be consider'd, is
^d D. 22. 3. 28. *not how it began, ^d but whether it has been knowingly used or approved for so long a Time.*

A Custom may be proved from a Record or publick Writing; for
^e D. 1. 5. 36. by the Writing for ^c Proof or Memory sake, its Nature is not alter'd, but it may still be called an *unwritten Law*. So a Custom may be proved by two Witnesses, that depose how they have seen the Thing done heretofore, that they always esteemed and accounted that to be the Way and Method, or that this Notion was deliver'd down to them from their Forefathers, and that they never knew the contrary; in which Case a Testimony of Belief is sufficient.

As a *Subsequent* Custom may take away and succeed in the Place of a Law, where the People are a free State; so a *Subsequent* Custom may take away a *Precedent* Custom. ^f But however one or two contrary Acts cannot take it away; tho' if it wants any Time to be a compleat Custom, one contrary Act destroys it.
^f D. 50. 17. 123. 1.

Customs in Courts of Judicature are called the *Course* or *Style* of the Court, and are ^g observed as the Law of it.
^g D. 22. 5. 3. 6.

By the Laws of England, no Custom or Prescription can take away the Force of an Act of Parliament. 1 Inst. 113. a. 115. b. and when it prevails in any Case, it must be Time out of Mind. And therefore by our Law a subsequent Custom cannot be said to take away a precedent Custom. 1 Inst. 114. b. See Book II. Chap. IV. Of Prescriptions.

The Laws of England are divided into three Parts. 1. Common Law, i. e. general Customs. 2. Particular Customs. 3. Statutes or Acts of Parliament. 1. Inst. 115. b. 344. a.

Of Equity.

VI. When the Law *subsists* in every Branch, it is subject to *Interpretation*, either from the *Words* of it, or *Circumstances* of the Fact, or the ^h *Intention*, or from the *Reason* of making the Law.
^h D. 1. 3. 17. The *Reason* of a Law, and the *Intention* of it are different; for the Reason of the Law is first enquired into to find out the *Intention*. If Occasion offers, an Interpretation may *restrain* or *extend* its Meaning; and if the *Intention* of the Law *ceases* in any particular Case, it is to be interpreted by *Equity*.

ⁱ *Equity* is the Correction of a Law which is too *universal* or general. This happens of Necessity; ^k for Legislators could not foresee
^k D. 1. 3. 12.

^f *Temporaria permutatio in Provincia non innovat.* D. 50. 17. 123. 1.

^g *In omnibus quidem, maxime tamen in Jure, æquitas spectanda est.* D. 50. 17. 19. *Quoties æquitatem Desiderii naturalis Ratio aut Dubitatio Juris moratur, Justis Decretis Res temperanda est.* D. 50. 17. 85. 2.

foresee all Emergencies. As for Example, it is Law that you should restore to every Man what is his own; but this Law does not comprehend the Case of a Mad-Man, when he desires that his Sword or Money should be restor'd to him. We must not therefore confound the *Interpretation* of a Law with the *Equity* of it; for in its *proper* Signification, *Equity* is a particular Interpretation by way of tacit *Exception* from a Law, rather than the Interpretation of it in its general Signification. But *Improperly*, an ¹ *Equitable Inter-* ¹ D. 1. 3. 13. pretation is said to be when a Cause is adjudged, (either where there is no positive Law at all to direct, ^m or when there *is* a Law and the ^m C. 3. 1. 8. Rigour or *'Axiōma* of it is not follow'd,) according to Right Reason and good Conscience. As in this Instance, according to the Decision of *Julian*: ⁿ A Man by his Will directs that if his Wife big with ⁿ D. 28. 2. 13. Child shall bring forth a Son, the Son shall have two Thirds of his Estate, and the Wife the other Third: But if his Wife hath a Daughter born, the Daughter shall have one third Part, and the Wife the other two Parts. Now it happens that both a Son and a Daughter are born, which Case was not foreseen, and therefore by Strictness the Testament is void for the Incertainty of it. But because it plainly appears to be the Intent of the Testator, that the Son should have double to the Wife, and that the Wife should have a double Portion to the Daughter, *Equity* suggests that the Estate should be divided into seven Parts, whereof the Son should have four, the Wife two, and the Daughter but one Part. Again, ^o the Father and ^o D. 34. 5. 9. the Son past Puberty are slain in Battel, and the Mother of the Son ¹ claims Succession in the Goods of the Son, supposing him for some Time to have survived his Father. The Kindred of the Father contend that the Father survived the Son; it is most equitable, and according to the Order of Nature to adjudge the Father to have died first.

A *Dispensation* of a Law is distinct from an *equitable* Construction of it. For a *Dispensation* suspends the Obligation of the Law itself when it *does* comprehend the Case; but *Equity* does not suspend the Obligation of the Law, but declares that the Case is *excepted* out of it. A *Dispensation* must be from the Legislative Power, and but rarely and cautiously used; ^p whereas *inferior* Magistrates may ^p D. 13. 4. 4. and *ought* to proceed according to *Equity*, ^q but in its *proper* Signi- ^q D. 45. 1. 9. fication.

Abrogation wholly revokes or annuls the Law, as *Dispensation* abrogates it in *Part*.

Besides an Equity founded upon a reasonable Construction of Law, in Opposition to the Rigour of it, there is an Equity so called in our Court of Chancery, &c. for which the Common Laws of England have made no Provision, as in the Cases of Frauds, Accidents, and Trusts, which supplies the Defect of our Laws in those or such like Instances, and corrects the Rigour of it. Doctor and Student, Dial. i. cap. 16, &c. 4. Inst. 84.

Thus far for the Law of *Nature*; of the Law of *Nations* and the *Civil* Law; from whence is to be learnt what is Just, or what is Justice.

BOOK I.

Of PERSONS.

CHAP. I.

Of a Person in its Natural Capacity; and therein of its Life, Sex, Age, Health; and lastly, of an humane Act.

THESE Things being premised, I shall treat of the *Civil* Law more distinctly to learn what is Justice, and shall (according to its usual Division) explain the three Objects of it, viz. *Persons, Things, and Actions*, i. e. *Judicature*. For in the Word *Action*, all the Order of Judicature, the *Beginning, Progress, and Sentence* is comprehended. Perhaps the whole Body of the Law might more commodiously be comprehended under *Contracts, Succession, and Judicature*; but I shall keep the old Method, that I may not create Confusion, or seem to lead into an untrodden Path.

First, Of Persons; which may be consider'd in their *Natural* or *Civil* Capacities.

Of a Person in its Natural Capacity.

A *Person* in its *Natural* Capacity is call'd *Man*; in which Capacity the Law does consider its *Life, Sex, Age, Health, and Actions, or humane Acts*.

Its Life.

I. *Life* is of such Value, that the Law pardons every thing done for the Preservation of it. [See Book III. Chap. X. Of Necessary Homicide.] It begins from the first Infusion of the Soul; and even when an Infant is in the Womb, it is supposed in Law to be born, if that Allowance will be to its Advantage after it is born.

^r D. 48. 21. 1.

^s D. 1. 5. 26.

For the Law of England, see 12 Car. 2. ch. 24. 10 & 11 W. 3. c. 16.

^r D. 5. 12. ubi v. Glöff.

The Birth is look'd upon to be *Legitimate*, if it comes *within* the tenth Lunar Month or forty Weeks, and *after* the sixth Month complete.

But see 1. Inst. 123. b. 2 Cro. 541.

^u D. 50. 16.

^{135.}

^w D. 1. 5. 14.

Also, it is allow'd, that a Woman may have five Children at one Birth. ^u If a *Monster* is born destitute of humane Shape, the Parents may reap some Civil Advantages by it, ^w though that cannot succeed their Estate.

II.

^r Ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit. D. 48. 21. 1.

II. The Sex is Man or Woman, or between both, an *Hermaproditus*,^x which is esteemed to be of that Sex which is most prevailing. If the Matter is doubtful, it is reckon'd to be of the Male kind. But under the Term *Homo*, or Man, both Sexes are comprehended.

Sex.

D. 1. 5. 10.

D. 50. 16.

152 & 195.

The Law farther takes notice of the Male Sex, whether castrated or frigid, and impotent. But the most important Enquiry here will be, which Sex has most Advantages from the Law. There are many Cases mention'd in which the Condition of Women is worse than that of Men. Some of those Instances are, that Women are removed from all publick Offices, unless there is a Custom or peculiar Privilege on their Side; that they cannot be Surety for another, by reason of the *Senatus Consultum Velleianum*; that they cannot be Witnesses to a last Will and Testament, (because they were not suffer'd to be present at publick Assemblies, where formerly Wills were made) nor Guardians, unless to their own Children; nor Arbitrators, &c. There are also Cases reckon'd where the Condition of Women is better than that of Men; as a Woman can sooner make a Will than a Man, she can be married sooner, she cannot be imprison'd in civil Actions, or criminal unless of a heinous Nature, lest her Chastity should be expos'd to Temptation under the Confinement. Daughters did never suffer Death for the Treason of their Fathers as Sons have done; if they are with Child, their Punishment of Death is deferr'd till they are deliver'd, &c. Vid. *Specul. de Procuratore*. Decius de Reg. Jur. l. 2. Where all the particular Differences are repeated with the Exceptions from each general Rule. But by Custom, the contrary has been practis'd in many of those Instances.

And, by the Laws of England, Women may be Sureties, Witnesses to a Will, Guardians, Arbitrators; they cannot sooner make a Will than a Man; they may be imprison'd in civil Actions if unmarried, and under all Circumstances in criminal Cases, and Death is deferr'd but once till Delivery, &c. 3. Inst. 17.

By the Divine Law, it was an Abomination for a Woman to wear Man's Cloaths, and for a Man to wear those belonging to a Woman, Deut. xxii. 5.

III. The Age of a Person is consider'd while *Impubes* which in Males is till they are fourteen Years old, in Females till they are twelve. The *Pubertas* is the growing Hair upon the *Os Pubis*.

Age.

Both Male and Female are *Infants* till the seventh Year complete. ^b *Infans quasi fandi impos*, for in the Law the Infant is supposed not to speak till that Age, because he understands not what he speaks. After the 12th or 14th Year, the *Pubertas* is reckon'd to continue till the 25th complete, and then is the full Age, and not before. But

D d

by

^y *Pronuntiatio Sermonis in Sexu masculino ad utrumque Sexum plerumque porrigitur*. D. 50. 16. 195.

^z *Mulieris appellatione etiam Virgo viri potens continetur*. D. 50. 16. 2.

^a *Fæminæ ab omnibus Officiis Civilibus vel Publicis remotæ sunt*. D. 50. 17. 2. *Mulieribus tunc succurrendum est cum defraudantur, non ut facilius calumnientur*. D. 50. 17. 110. 4.

^b *Cum Fari potuerit, & postquam Fari potuerit, distinguuntur*. D. 50. 16. 217.

by the Grant of the Prince, a Man may be at full Age when *Twenty*, and a Woman at *Eighteen*.

By the Laws of *England* and *Scotland*, one (*Male or Female*) is at full Age regularly at *twenty one Years*; till that Time an *Infant*, and incapable to *Alien or Contract*, 1. Inst. 78. b. Lit. § 104. Mackenzy's *Institutes*, &c. lib. 1. t. 7. By a *Constitution in the Kingdom of Naples and Sicily*, one is of full Age at *eighteen Years old*. Marantæ Spec. aur. de Appel. Num. 80. Joan. de Arnono. Differentiæ Juris Cæsar. & Regn. Sicil. 50.

^c D. 50. 17.
2. 1.

^c One that is *Impubes*, is incapable of any publick Office, unless by Inheritance.

From the 25th till the 46th, a *Person* is said to be young, and after that old Age encroaches.

^d N. 13. 7. c. 2.
C. 1. 3. 9.
D. 38. 1. 15.
D. 50. 6. 3.
C. 10. 31. 10.

In several particular Instances, a certain Age is requisite; for which there are Directions in the ^d Margin.

And so the Law of *England* takes notice of the several Ages of Man and Woman. 1 Inst. 78. b.

Health.

IV. *Health* is destroyed by the Diseases of the Mind or Body. The *Fool*, the *Mad-Man*, and the *Prodigal* are diseased in Mind, and the Law does almost make the same Provision for them.

The King of *England* is the general Guardian of *Idiots and Lunatics*. 17. Ed. 2. c. 9. & 10.

^e D. 1. 18.
13 & 14.

There are two sorts of *Mad-Men*; those that are continually out of their Senses, who are not allow'd to do any manner of Business, and are never ^e punished for the Commission of any Crime or Breach of Laws; and those whose Madness sometimes does abate and admit of *lucid Intervals*; these are under the same Circumstances with other Men, and at ^f that Time have all the Advantages of the Law. They have Power to make a Will, and all their Contracts are valid, notwithstanding any Return of their Disease.

^f D. 28. 1. 20.
4.

^g D. 27. 10.
1.

^h D. 45. 1. 6.

ⁱ D. 50. 17.
5. & 40.

The *Prodigal* likewise (who knows no End or Measure in his Expences, but wastes and squanders away his Estate) has the same Care taken of him. The *Prætor* ^g assigns him a Curator as he does the Madman, till he becomes prudent and discreet. The Law nulls all Obligations, Alienations and Contracts that he is engag'd in, ^h unless it be those that tend to his Advantage; in which Particular, his Condition is better, because a ⁱ Madman has no Will or Understanding at all, but is like a Man that is asleep or absent, or like an Infant; whereas the *Prodigal*, as a Minor has some Seeds of Discretion in him, and is only compared to a Madman when he acts like him. The Reason of that Exception is, because the Interdiction of the *Prætor* was for the Interest only and in Favour of the Prodigal, and

^c Impubes omnibus Officiis civilibus debet abstinere. D. 50. 17. 2. 1.

^e Furiosus nullum Negotium contrahere potest. D. 50. 17. 5. Furiosi, vel ejus cui bonis interdictum est, nulla voluntas est. D. 50. 17. 40.

^g Expedit Reipub. ne sua re quis male utatur. I. 1. 8. 2.

and therefore ought not to be extended to any Act that shall be prejudicial to him when he acts judiciously.

It has been a great Question, whether a Prodigal, *ipso jure*, may be interdicted all Commerce and the Use of his Estate, or whether a declaratory Sentence of the *Prætor* is first necessary. It is certain that a *Madman* is interdicted without a declaratory Sentence, and that his Actions presently are void in themselves. It is certain again, that a Contract with a Prodigal to furnish him with Money to give to his Whore, &c. ^k is also void in Law. And indeed, the Law of ^k D. 41. 4. 8. the twelve Tables immediately committed the Administration of his Estate to the next of Kin; but because in all Probability it cannot be presently evident when a Person ought to be accounted a Prodigal, the common Method has been to make Application to the Magistrate, and expect his Decree before his Acts can be void, and before the Kindred can take him into their Care and Custody.

The Laws of England take no Care of Prodigals; upon which Account the Publick suffers in the Decay of ancient Families, and in all those Instances which Luxury and Men of desperate Fortunes can bring upon it. In France Prodigals are declar'd by Sound of Trumpet.

The *Diseased in Body* have a Disease upon them either *Sontick*, i. e. which renders a Person incapable of all manner of Business; as a violent Fever, &c. *Sons* signifies the same with *Nocens*. This so far excuses from Attendance at a Court of Justice, that the Person so afflicted is not bound to appear even by a ^l Proctor; and if the Judge pronounces Sentence against him, that ^m Sentence is null ^l D. 2. 11. 2. 3. and void. Or the Disease is *not Sontick*, or matter of Excuse from ^m D. 42. 1. 60. Business or Attendance upon Summons, as an Ague, &c. To which may be referr'd several *Imperfections* rather than Diseases, as Dumbness, Deafness, Lameness, and Blindness, &c.

After the Enquiry into the *Natural Capacity* of a Person, the first thing that occurs is its *Actions* or *humane Acts*; which though they do not come under the Notion of a *Person*, yet may not improperly be treated of in this Place, seeing it is the first Attendant upon him.

V. In an humane Act, the *Intention*, *Regularity*, and *Execution* ^{Humane Acts.} of it are to be consider'd.

I. The *Intention* of an humane Act is the Design of the Person acting; which proceeds from his Understanding and Will. For it is necessary that he should have a right ⁿ Notion of what he is doing, ⁿ D. 44. 7. 57. otherwise a ^o *Mistake* renders the Act as not done at all. This is re- ^o D. 50. 17. quired in the making of Testaments, in Contracts, in the Commission ^{76.} of Crimes, and in all Affairs of what Nature soever where Consent ^{D. 50. 17. 116. 2.} is supposed. Nay, even the Grant of the Prince averr'd to be *ex certa scientia*, hath no Effect, if it evidently appears that the Prince was *deceived* in his Grant.

A Man

^o Non videntur, qui errant, consentire. D. 50. 17. 116. 2.

In totum omnia, quæ animi Destinatione agenda sunt, non nisi vera & certa scientia perfici possunt. D. 50. 17. 76.

A Man likewise must *will* that Act before he can be answerable for it. The Will may be expressed by *Words*, by *Signs*, and *bare Consent*; which Consent, ^p *Silence* seems to infer, especially if the Fact is such as might have been prevented by speaking and declaring to the contrary. Indeed Silence *generally* infers Consent, if it tends to the Advantage of the silent Person; but if his Damage will follow from it, ^q he seldom is esteem'd to be consenting. I said an Error or *Mistake* rendred the Act as not done at all; because *Intention* and Design was requisite, from which every Act was to be estimated. But this Error must be in a *substantial* part of a Contract, and not in the ^r *Name* of it, or the *Cause*, or some other *External* Circumstance or *Opinion* about it.

With Regard to the Commission of a *Crime*, though the Crime was committed by a Mistake, yet if there was a *Neglect* or ill *Intention* at first that accompanied the Action, the Criminal must be answerable for all the unforeseen Accidents and ill Effects that follow upon it.

Ignorance is different from *Error*; for where Ignorance is, there cannot be *Intention*. There is an Ignorance of *Law* and of *Fact*. If one is ignorant that his Brother is dead, it is an Ignorance of *Fact*, or of a Thing done; but if he knows that he is dead, and yet knows not that he ought to succeed in his Estate, ^s it is an Ignorance of the *Law*. Now if the Law is a *Natural* or *Divine* Law, no Person pretending Ignorance of it can be excused. But if it is ^t *Civil* Law, the Ignorance of it does not prejudice those that are seeking their own again, to avoid being damnified; that is, such Ignorance cannot be objected to them, but leaves them to their legal Remedies; as when a Man sues for Money back again (which, being ignorant of the Law, he thought ought to be paid) the Objection of Ignorance shall be laid aside; but if any one seeks Gain by it, the Plea of Ignorance shall not be advantageous to him, neither will the Law assist him. For if one, through Ignorance of the ^u Law, shall renounce the Inheritance of his Mother, there is no Way to recal it; neither can any one prescribe or have a Title or ^w an Estate which he bought of a ^v Minor, altho' at first he thought it was lawful to contract with him. But *Soldiers* and *Minors* are protected by their Ignorance of the Law, not only when they would ^x repair their Damages by the pleading of it, but while they are pursuing to get something which they had not before. Also *Rusticks* have the same Indulgence, and *Women* sometimes, provided they had not Opportunity of Counsel and of better Directions.

Vid. Gloss. verbo Quibusdam in D. 22. 6. 9. *Otherwise in the Laws of England; for Soldiers, Women, or Rusticks have no such Privilege.* Dr. & Stud. l. 2. c. 46.

But in a *pænal* Law it holds generally, that the Ignorance of the Law does not excuse any one; for it is (*Culpa Lata*) a great Fault to

^p Qui tacet consentire videtur. Reg. 43. in 6.

^q Semper qui non prohibet pro se intervenire, mandare creditur. D. 50. 17. 60.

^r Qui tacet utique non fatetur, sed tamen verum est eum non negare. D. 50. 17. 142.

^s Ignorantia juris cuique nocet. D. 22. 6. 9.

to be ignorant of those Laws, or of any other Laws, which are finite and limited, certain and supposed to be known, and where the Lives and Fortunes of Men are so nearly concerned.

An Ignorance of *Fact*, is either an Ignorance of my *own* Fact or of *another* Person's. Ignorance of my *own* Fact is intolerable, and no Man is allow'd to pretend it; unless again it is to prevent his being *damnified*, as by a negligent Payment of Money which was paid before, ^z or when the Question is of a Thing *done* long ago, or ^z is intricate in its Nature; for then the ^a Law does believe the Person asserting his Ignorance, till the Probability of his Knowledge is proved by his Adversary. But the Ignorance of the Fact of *another*, is easily presumed on all Accounts, and ^b must for ever excuse, unless it is gross and affected.

And as *Ignorance* does *qualify* the Action, so if any thing is said or done in *Passion* or *sudden* Anger, that Person is to be favour'd unless he does persevere in it. This is not to be extended to those Cases where Repentance cannot *revoke* the Thing done, or give Satisfaction; as when a Man in his Passion kills or wounds his Companion.

Farther, an *Intention* cannot be presumed if a Thing happens by *Chance*, or is done by reason of a *Force* upon me, or through *Fear*, *i. e.* such a ^a *Force* which could not be avoided, and such a reasonable ^c *Fear* which might prevail upon a courageous and a wise Man.

Neither if any thing is done or omitted through *Necessity*, is there a Presumption of Design; for if a Man is not *willingly* ^t absent, Allowances must be made; and he is excusable for not coming, who was hinder'd by a Storm or Inundation of a River.

2. The *Regularity* of an humane Act consists in its being firm and *legal*; for,

First, If an Act be against the Prohibition of Law, it is not only irregular and ineffectual, ^z but is to be esteem'd as never done at all.

Vid. antea, *The Introduction, Of written Laws.* in fin.

Except from this *general* Proposition those particular Cases, which the Law says shall not be done, but ^b that if they *are* done, they shall remain as valid and may be confirmed.

Secondly, ⁱ That an Act should be firm and *legal*, it is requisite that it should be done *bona fide*. Pursuant to this, ^k there cannot be a Prescription arising from a Contract dishonestly made; ⁱ for what

E e

was

^b Ignorantia Facti alieni tolerabilis est Error. D. 42. 10. 5.

^c Quicquid in calore iracundiæ vel fit vel dicitur non prius ratum est quam si perseverantia apparet iudicium Animi fuisse. D. 50. 17. 48.

^d Nil consensui tam contrarium est quam Vis atque Metus, quem comprobare contra bonos mores est. D. 50. 17. 116.

^e Vani Timoris iusta Excusatio non est. D. 50. 17. 184.

^f Quæ propter Necessitatem recepta sunt, non debent in Argumentum trahi. D. 50. 17. 162. Non negligentibus subvenitur, sed necessitate rerum impeditis. D. 4. 6. 16.

^g Ejus nulla culpa cui parere Necesse sit. D. 50. 17. 169.

^h Aliquando quod fieri non debet factum valet. Gloss. in l. 5. Cod. 1. 14. verbo, Pro infectis.

ⁱ Ratum non habetur quod non bona fide gestum est. C. 4. 44. 1.

^j Quod initio vitiosum est non potest tractu Temporis convalescere. D. 50. 17. 29.

^b Gloss. in l. 5. Cod. lib. 1.

Tit. 14. verbo, Pro infectis.

ⁱ C. 4. 44. 1.

^k C. 7. 26. 1.

^l D. 50. 17. 29.

was vicious and naught at first, cannot by Length of Time be made valid, and it is not fit that any Man should be allow'd to reap a Benefit by Fraud.

Sed vid. post, *Of Prescriptions.*

Thirdly, That an Act should be *regular* and *legal*, *Diligence* is necessary; ^m for a *Fault* or *Neglect* is discountenanced, and every one is answerable for it. *Neglect* is the Mean between two Extreams, *Deceit* and *inevitable Chance*; by one of those three Ways Men lose their Rights without their Consents.

As there are three *Degrees* of Diligence, *viz. ordinary* Diligence, *extraordinary* Diligence, and *most exact* Diligence; so there are three Degrees of Faults or Neglect. *Lata Culpa* a great Fault, *Levis Culpa* a small Fault, *Levissima Culpa* the smallest Fault or Neglect.

ⁿ D. 50. 16. 223. A ⁿ *great Fault* is a gross and supine Negligence; as not to understand what all Men are supposed to understand: Thus it is if a Man should not observe what was ^o publicly proclaimed; or when one alone is ignorant of that which all in the City besides him are well acquainted with; or when one leaves open his Doors in the Night time, &c. A Fault of this Nature is said to be *next* to Deceit, and ^p sometimes termed absolutely so; tho' it is not truly *Deceit*, but only by the Presumption of Law. This *Presumption* takes place only in ^q some Contracts, and in those *Trespases* where a Pecuniary Punishment is to be inflicted; not when the Punishment is ^r corporal; ^r for then it is not compared to Deceit, nor is it punished as such.

^s D. 17. 2. 72. A *small Fault*, is that sort of Negligence where a Man does not take such Care about the Concerns of other Men as *discreet* and *diligent* Men make use of about their own Affairs; and this is esteemed a culpable Neglect, tho' this Person is not more diligent about Concerns that are his own. Thus it is when one leaves open the upper Windows of his House, whereby Thieves with Ladders do enter and steal the Goods of another Man, which were pawn'd or lent. But note, that when Mention is made *simply* of a Fault, a *small Fault* or Neglect is to be understood, unless the Reason of the Thing and Subject Matter directs otherwise.

^t D. 50. 17. 132. *Unskilfulness* in any Art comes almost under this Head, and *Weakness* or *Impotency* in managing any Matter which is undertaken, ^u by which Danger and Damage happens to others.

^w I. 3. 15. 2. The ^w *smallest Fault* or Neglect is when a Man does not take that Care which the *most exact* and *most diligent* Men are wont to do; as

^m *Melioris Conditionis ne sint Stulti quam Periti.* D. 43. 24. 4. *Quod quis ex culpa sua Damnum sentit non intelligitur sentire.* D. 50. 17. 203. *Unicuique sua mora nocet.* D. 50. 17. 173. 2. *Non debet quis Negligentiam suam ad alienam injuriam referre.* D. 2. 15. 3.

ⁿ *Lata Culpa finis est non intelligere id quod omnes intelligunt.* D. 50. 16. 223.

^p *Magna negligentia Culpa est, magna Culpa Dolus est.* D. 50. 16. 226. *Lata Culpa plane Dolo comparabitur.* D. 11. 6. 1. 1.

^r *Imperitia Culpa annumeratur.* D. 50. 17. 132. *Infirmetas Culpa annumeratur.* D. 9. 2. 8. 1. *Culpa est immiscere se rei ad se non pertinenti.* D. 50. 17. 36.

^s *Culpa abest si omnia facta sunt quae diligentissimus Quisque observaturus fuisset.* D. 19. 2. 25. 7.

as when a Man suffers a Thing in his Custody to be stolen, which might some way or other have been prevented; as not to fix Bars in the upper Windows of those Chambers which are remote from the Family, and toward the Street, &c. For if a Thing is taken away by *Theft*, That is not to be reckon'd as lost by ^x *Chance* or ^x D. 17. 2. *Accident*, but it is to be imputed to the *smallest* Fault or Neglect; ^{52.} 3. when Things of Accident, properly speaking, cannot be avoided by any humane Care or Industry; as Fire, Robbery, an Incurſion of Enemies, an Inundation of Waters, &c.

^y All Persons in all Cases are to be answerable for *Deceit*, notwithstanding a contrary Agreement; but no one in any Case for inevitable Chance, ^z unless there is an *Agreement* to answer it. ^y D. 50. 17. ^z D. 13. 6. 5.

If there is no *particular* Agreement, these *Rules* will instruct what ^{2.} *Diligence* is required to make a humane Act not culpable. *First*, In ^a Contracts to the *Advantage* of the *Giver* only, the Receiver is ^a D. 13. 6. 5. 2. answerable only for *Deceit*, and a *great* Fault or *Neglect*, as in the ^{D. 50. 17. 23.} Case of a *Depositum* or any moveable Thing delivered to a Friend to be kept for me. *Secondly*, When a Contract is made for the sake of the *Receiver only*, there *Deceit*, and *every* Fault, even the *smallest*, will affect; as in the Case of a Thing *lent*. *Thirdly*, If the Contract is *both* for the sake of the *Giver* and *Receiver*, there the Person guilty of *Deceit*, a *Great* or *Small* Fault, must bear the Blame and Damages; as in Selling, Letting to Hire, the Case of a Pledge, Partnership, and Money given in Marriage.

This last Rule may be apply'd to *Innominate* Contracts, and to other Cases as far as their Nature will bear. ^b The Master of a Ship, and ^b D. 4. 9. 1. Inn-keeper, &c. are answerable for the *smallest* Fault, upon a *particular* Reason, because of the great Opportunities they have of defrauding their Customers and Guests.

Fourthly, That an Act be *Regular*, the necessary Methods for Solemnity of *Time* and *Place* must be observed. But where ^c evident Equity does intervene, the Omission of a Solemnity may be ^c D. 50. 17. 183. dispensed with.

A Circumstance of *Place* is when Enquiry is made whether an Act be done in *Publick* or *Private*, in a Place that is *sacred* or *profane*.

^d A Circumstance of *Time* appears upon the Question *when*, and in *what* time such an Act was done, in what *Hour*, *Day*, *Month*, or *Year*; whether a *Natural* Day of twelve Hours, or a *Civil* Day of twenty four Hours; whether in a *Pleading* Day, or ^e *Holiday*; ^e C. 3. 12. t. t. whether

^y Non valet si convenerit ne Dolus præstetur. D. 50. 17. 23.

^z Fortuitos casus Humanum Consilium prævidere non potest. D. 50. 8. 2. 7. Culpa caret qui scit sed prohibere non potest. D. 50. 17. 50.

^c Etsi nihil facile mutandum est ex solemnibus, tamen ubi evidens Æquitas poscit, subveniendum est. D. 50. 17. 183.

^d Cujusque diei major pars est Horarum septem primarum diei, non supremarum. D. 50. 16. 2. 1. Cum Bissextum Calendis est, nil refert priore an posteriore quis natus sit, nam Bissextum pro uno die habetur. D. 50. 16. 98. Si quis Sic dixerit ut intra diem mortis aliquid fiat, Ipse dies mortis quoque numeratur. D. 50. 16. 133. Ubi Lex Duorum mensium fecit mentionem, & qui Sexagesimo die venerit audiendus. D. 50. 17. 101. Annum civiliter, non ad momenta Temporum, sed ad dies numeramus. D. 50. 16. 134. Anniculus amittitur, qui extremo die anni moritur. D. 50. 16. 132.

whether there were so many *continual* Days without any Interruption, or *profitable* Days, and Days of pleading allowed, &c.

^f C. 6. 30. 22. A *Month* absolutely speaking is ^f thirty Days; but in ^g favourable Cases, or when the Term of a Month is assign'd from the Middle of any Month, it is one and thirty.

ⁱ 2.

^g D. 50. 17.

101.

But in the common Law of England, a Month or a Twelvemonth in the singular Number, is to be reckoned according to the Kalendar. Yet if we say two Months, or twelve Months in the plural Number, it shall be accounted a Month of Weeks, which is 28 Days, Vid. Coke's Rep. Lib. 6. fol 61. Catesbie's Case.

3. In the Execution of a humane Act, a Cause, a true or false Demonstration, a Modus, and a Condition may be added to it.

^h D. 35. 1. 72.

6.

ⁱ C. 6. 44. 1.

A ^h Cause is the Reason why the Act is done; ⁱ which though a false Reason, yet it does not make the Act ineffectual, unless it plainly appears that the Act had not been done, but upon that Reason.

^k D. 35. 1. 17.

& D. 30. 1.

75. 1.

A ^k Demonstration is a Description of the Thing, which tho' false, does not make the Act void; as I give to Titius one hundred Crowns which I owe to him; though there was nothing due, yet such a Legacy is good. The Intention of the Testator is to give and to be liberal, and the Sum is described by him; but if the Sum had not been mentioned, in this Case nothing could have passed.

Vid. post, Of Legacies.

A Modus is the final Cause of the Act, and which is to be perform'd after the Act. It is described by the Word ^l [that] or to the same Effect, as a Condition is describ'd by the Word [if] or to that Purpose. It is distinguish'd from the Cause, for That must precede the Act. As I give you twenty Pound that you may build me a Monument; the Money is presently payable, and you can only oblige him by Covenant to erect the Monument. But if the Words had been, if you will build me a Monument I will give you twenty Pound, nothing is payable ⁿ till that Condition is perform'd.

^m D. 25. 1.

40. 5.

ⁿ D. 35. 1. 41.

Modal and Conditional Expressions are sometimes taken the one for the other; as I give Sempronia an hundred Pound if she will marry Titius, or that she may marry Titius; ^o in both these Cases the Gift shall take Effect, if she is willing, and Titius refuses.

^o C. 6. 25. 1.

A Condition is the Suspension of the Execution of an Act till something is perform'd which may be and which may not be: Therefore if the Event is certain the Gift is absolute; ^q for there the Gift is not suspended, but the Payment delayed; as I give to you a hundred Pound when I die; for it is a Promise to be perform'd at such a Time, not upon such a Condition.

^q D. 35. 1. 79.

Conditions must respect Futurity, and if the Person who is to have Advantage by the Condition is willing to perform it, yet cannot by reason of the Refusal of other Persons who are necessary to the

^p Quod pendet non est pro eo quasi sit. D. 50. 17. 169.

^q Cum solvendi Tempus Obligationi additur, nisi eo præterito, peti non potest. D. 50. 17. 186.

the fulfilling of that Condition, * in this Case the Condition shall be esteem'd to be perform'd. Thus if I give to *Titius* (if he will marry *Seia*) a hundred Pound; if he is ready to perform that Condition, though the Woman refuseth, * the Legacy is due to him. * But if the Performance of the Condition is prevented by *Chance*, as by Death, &c. the Gift cannot pass. D. 28. 7. 3.
D. 35. 1. 31.
C. 6. 46. 4.

If the Condition respects the *present* or the *past* Time, as I give to *Titius* if he *does* take care of my Affairs, or *hath* taken care of them, the Gift is absolute or not absolute at the Time of speaking. The Gift is not *really* suspended; there is only some Time requisite to enquire into the Matter of Fact, *viz.* " whether *Titius* did take care of his Affairs or not. D. 35. 1. 17.
3.

A Condition therefore *properly* speaking must be subsequent to the Declaration of the Gift; and in *Contracts*, if the Party dies before the Condition happens, the Heir may take the *Advantage* of it when it does happen; * but in a Legacy (if the Legatary dies before the Condition happens) his Heir can have no Advantage, but the Legacy is lost; because in Gifts by Will, the Testator has Regard to the *Person* of the Legatary, but in Contracts Regard only is to be had to the *Thing* contracted for, in which Heirs have an equal Interest with the Deceased. I. 3. 16. 4.
D. 36. 2. 4.

In Conditions which consist in not doing (as I give you a hundred Pound if you do not go into the *Capitol*) a Legacy passes as soon as *Security* is given that you will not go into the *Capitol*. This was contrived by *Q. Mutius*, and therefore call'd *Cautio Mutiana*. But in *Contracts* upon *such* a Condition, the Death of the Person to whom the Gift is made must be expected; for it seems to be the Design, that his Heir only should reap the Benefit of it. D. 35. 1. 7.

* If the Conditions are added *conjunctively*, they must all be performed; as I will give you ten pounds if you will go to *Constantinople* and *Rome*; but if the Condition is put *disjunctively*, as if you will go to *Constantinople* or *Rome*, it is sufficient to obey any one of them. I. 2. 14. 11.

In the Laws of England, the most usual and known Distinction of Conditions is, that a Condition is either precedent or subsequent, i. e. a Condition is to be perform'd before an Estate or Thing given can take Effect, or the Condition is to be performed within some Time afterwards.

Conditions also may be *impossible* to be performed, or *possible*.

Impossible, which cannot *naturally* come to pass; as if an Estate should be given to me by *Will* upon Condition that I touch'd the Heavens with a Finger, &c. A Condition *contrary* to *Law* and *good Manners*, shall be likewise esteem'd *impossible*; as when I bequeath an Estate to you, if you will commit *Adultery*; if you will not maintain your Father, or redeem him from Captivity. Upon this Account a Gift with this Condition, *viz.* if *she does not marry*, D. 28. 7. 14.
D. 35. 1. 22.

F f

* In Jure Civili receptum est, quoties per eum, cujus interest Conditionem non impleri, fiat quo minus impleatur, perinde haberi ac si impleta Conditio fuisset. D. 50. 17. 161.

In omnibus causis pro facto accipitur Id, in quo per alium mora sit quo minus impleatur. D. 50. 17. 39.

^c D. 35. 1. 64. *ry*, is void; ^c not if she is restrain'd to marry a *particular* Person, or
^d D. 35. 1. 62. restrain'd from Marriage for a *Time* for the Sake of her ^d Children,
^{2.} ^e D. 26. 7. 5. 8. ^e nor if she is order'd to consult *Titius*; for she may consult him and
^f D. 35. 1. 72. 4. marry without his Direction. ^f A Condition referring it wholly to
^g C. 6. 40. the *Pleasure* of *Titius* whether she shall marry is void. ^g But these
Authent. cui Conditions restraining Marriage are only void in relation to *Virgins*,
Relict. not to *Widows*.

In the Laws of England, there is no such Distinction.

It is certain that the Addition of these Conditions in Last *Wills* and *Testaments* is ineffectual and to no Purpose, for there is no Obligation to observe them. But it is otherwise in ^h *Contracts*, which are null because such Illegalities or Impossibilities are added; so that even a natural Obligation does not arise from them. The Reason of the Diversity is, because in *Contracts* the Design of the Person contracting is to be consider'd; which cannot appear to be any at all, since a Condition is added which such Person is presum'd to *know* was *impossible* or *illegal*. But in Last *Wills* and *Testaments*, a large Interpretation for the Good of the Publick is admitted; and it is not to be presumed that a Man having the Thoughts of Death before him, would in a serious Temper of Mind make his Last Will and Testament, and at the same time add a Condition to null and cancel it.

Quære whether this Distinction concerning impossible Conditions, with respect to Wills and Contracts, is allow'd in the Laws of England? or if they are required to be precedent to the Act, they do not render the Gift null and void in both Cases? therefore see 1. Inst. 206. a. & b.

To an *impossible* Condition may be referr'd, that which depends wholly upon the *Consent* of the *Prince*, and that which is very *difficult* to be perform'd; or *that* is reputed impossible, which is *perplex'd* and *unintelligible*.

ⁱ D. 50. 17. 174. A *possible* Condition is that which may naturally and legally come to pass, and is either a *potestative* Condition when it is in my Power to perform it; ⁱ which if one refuses to perform when he may comply with it, or hinders the Performance of it, when it was his Duty to do it, the Condition may be supposed to exist; or *casual*, which is not in my Power, as I will give, &c. if such a Ship return from *Asia*; or *mixt*, which partakes of the Nature of *both*, as when the Condition may naturally be performed, but some Accident (as Robbers or the Disagreement of other Persons concern'd) does prevent it. In both those Cases also the Condition shall be taken to be fulfilled.

^k D. 50. 17. 77. ^k Every Act cannot *have* a Condition annex'd to it; for many Acts that proceed from the *Law* or *Magistrate*, cannot admit of an Addition of a future Time; for they are denominated such and such

ⁱ Qui potest facere ut posset Conditioni parere, jam posse videtur. D. 50. 17. 174.

^k Quidam Actus legitimi non recipiunt Conditionem. D. 50. 17. 77.

such Acts from their *Execution*. Therefore if a Condition or future Time is annex'd repugnant to the *Substance* of any Act, it cannot yet be call'd an Act, for *Emancipation, Acceptilation, i. e.* an Acknowledgment by Word of Mouth, that a Debt was paid when really it was not, *Entry* upon Lands, &c. are Words that signify a *present* Act; to which if any Day or Condition is annex'd, there seems to be included a Declaration contrary to such an Act.

¹ The Addition of an *uncertain* Day in a Will makes a *Condition*, ¹ D. 35. 1. 75. for the Act is *suspended* till that Time; especially if it is uncertain *whether* the Day will happen, and *when*. But if the Day is *certain*, and you know not *when* it will happen, as at the Day of your Death, ^m the Gift is *pure*, if it respects only the Death of the Person who receives the Gift. ^m D. 30. 1. 79.

An *Humane* Act being so explained, we may proceed and say, ^a that *Words* are contained under that general Expression of an humane Act; as also ^o *Signs* which have the same Effect with Words, ¹⁹ and which (if they are manifestly intelligible) do not differ from ⁸ them. For Words were invented that our Thoughts might be understood, which being expressed in another Manner, will raise the same Effect in us. If we doubt of the Sense of Words, we must recur to the common Use of speaking, and not ^p decide the Matter ^p D. 33. 10. 7. by any *particular* Opinion. ²⁴

He also may be said to act that does *Omit* his Duty, and that Thing may be reputed to be done (as before mentioned) which was *not* done, ^a when there is a hindrance by the Person who has an Interest in the *not* doing of it. ^a D. 50. 17. 121.

^r He likewise is esteemed to act *Himself* who acts by *another*; and an Act shall be imputed to one who *commands* it, or to him who *only* gave *Directions* and *Counsel*. ^r D. 50. 17. 180. ^r D. 47. 2. 50.

These *Rules* may be added concerning an humane Act.

^s He that can do the greater Act may do the lesser, if there was no Grant of a particular Power only, &c. ^s D. 50. 17. 21.

^u He may *dissent*, that may *consent* to Act. ^u D. 50. 17. 3.

^w No one ought to suffer by the Act of one that is a *Stranger* to him. ^w D. 50. 17. 155.

No

^a Actum generale Verbum est, siue Verbis, siue Re quid agatur. D. 50. 16. 19. Gestum rem significat sine verbis factam. Eodem sed v. D. 50. 16. 58.

^o Indubitabile signum nihil pene à Nomine differt. D. 28. 5. 9. 8. Ubi non voce sed presentia opus est, mutus si intellectum habet, potest videri respondere. D. 50. 17. 124.

^p Non ex opinionibus singulorum, sed ex communi usu nomina exaudiri debent. D. 33. 10. 7. 2.

^r Qui non facit quod facere debet, videtur facere adversus ea quæ non facit. D. 50. 17. 121.

^s Qui jussu alterius solvitur, pro eo est quasi ipsi solutum esset. D. 59. 17. 180. Qui facit per aliam perinde est ac si faciat per se. Reg. 72. in 6. Is damnum dat qui jubet dare. D. 50. 17. 169. Dejecit & qui mandat. D. 50. 17. 152. 1.

^t Fraudis Interpretatio non ex Eventu duntaxat, sed ex Consilio quoque desideratur. D. 50. 17. 79. Consilii non Fraudulenti nulla obligatio est. D. 50. 17. 47.

^u Non debet cui plus licet quod minus est non licere. D. 50. 17. 21.

^w Ejus est nolle qui potest velle. D. 50. 17. 3.

^x Factum cuique suum non Adversario nocere debet. D. 50. 17. 155. Unicuique sua mora nocet. D. 50. 17. 173. 2. Non debet alteri per alterum iniqua Condicio inferri. D. 50. 17. 74. Neque interdicto neque in cæteris causis Pupillo nocere oportet Dolum Tutoris. D. 50. 17. 198.

- ^x D. 50. 17. ^x No one can pass over a greater Right than he has in himself.
^{54.}
^y D. 50. 17. ^y What is done cannot be undone, and a Covenant to make it
^{31.} undone is void.
^z D. 50. 17. ^z That which is mine cannot be transferr'd to another without
^{11.} my Act.
^a C. 5. 17. 3. ^a Every Act that is wisely and well done, ought to be supported
and take effect.
^b D. 28. 7. 15. ^b Those Acts which are against Piety, Modesty or good Manners
are supposed in Law to be null and void.
^c D. 50. 16. ^c Not to act may be esteem'd in Law to act.
^{189.}
^d D. 50. 17. ^d No one seems to have an ill Design against another, while he acts
^{55.} where he has a Right to act.

C H A P. II.

Of a Person in its Civil Capacity, viz. Of a Person as a Freeman or Slave, a Citizen, Master of a Family, Husband or Wife, Father or Son, Guardian, Prince or Subject: And Lastly, Of a Corporation.

- ^e I. 1. 3. 1. ^{I.} ^e Liberty or Freedom is a natural Power to do as one thinks fit,
Of a Person as unless hindered by Force or the Law. Those that enjoyed
Freeman or Freedom were either *Ingenuous*, i. e. born of a ^f Woman that was
Slave. free at any time after Conception, and before the Birth; or *Liber-*
^f I. 1. 3. 5. *tines*, i. e. those that were *manumitted* and made free from Bondage,
I. 1. 4. pr. to which they were *born*. This *Manumission* was often by Law even
against the Master's Will; as when a Bondman discover'd any Per-
^g D. 47. 10. son guilty of some great Crime, or of the Death of his ^h Master, &c.
^{5. 11.} If Freedom was not given by Law, there was a Necessity of the Ma-
^{C. 7. 12. 2.} ster's *Consent* to obtain it.
^h D. 38. 2. 4. After *Manumission*, the Master became the *Patron* of his Free-
man, and had great Advantages by it. He had a Natural Right to an
extraordinary Reverence and Respect from him, insomuch that he
might recal him into Bondage for ⁱ *Ingratitude*.
ⁱ C. 6. 7. 2.

Otherwise by the Laws of England. I. Inst. 137. b.

The

- ^x Nemo plus Juris ad alium transferre potest quam ipse habet. D. 50. 17. 54.
^y Verum est neque pacta neque stipulationes factum posse tollere. D. 50. 17. 31.
^z Id quod nostrum est sine facto nostro ad alium transferri non potest. D. 50. 17. 11.
^a Dubium non est omnia quæ Consilio rectè geruntur, jure meritoque effectu & firmitate niti.
C. 5. 17. 3.
^b Quæ facta lædunt pietatem, existimationem, aut verecundiam nostram, aut contra bonos
mores sunt; hæc nec nos facere credendum est. D. 28. 7. 15.
^c Facere oportere & hanc significationem habet ut abstineat quis ab eo facto quod contra
Conventionem fieret, & curare ne fiat. D. 50. 16. 189.
In omnibus causis pro facto accipitur id, in quo per alium fit quo minus fiat. D. 50. 17. 39.
^d Non videtur dolo facere qui Jure suo utitur. D. 50. 17. 55. Nemo damnum facit nisi qui
id fecit quod facere Jus non habet. D. 50. 17. 151. Non videtur vim facere qui Jure suo
utitur. D. 50. 17. 155. 1.
^e Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut Jure prohi-
betur. I. 1. 3. 1.

The Patron could not have an ^k Action brought against him by ^k D. 2. 4. 4. 1. his Freeman without Leave first obtained, neither then could the Freeman bring an Action that should render his Patron ^l infamous, ^l D. 37. 15. 2. or subject him to Disgrace. By Contract or Agreement (as it was ^{5. 6. & 7.} usual) the Profit of some certain Art, in which the Freeman was skilled, did belong to the Patron.

As is the Case of Apprentices in England.

The Patron also had a Right of ^m Succession in the Goods of the ^m D. 58. 2. 2. Freeman that was manumitted.

All which with the various Methods of Manumission, the Studios in Antiquity may see fully handled in Justinian's Institutes and the common Systems.

But whatever were the Diversities of Freemen heretofore, by a later ^a Constitution every Person manumitted was to be accounted In- ⁿ Nov. 78. genuous, saving always the Rights of the Patron; unless they were ^{c. 1.} particularly remitted.

In ^o Favour of Liberty the kindest Constructions are to be made ^o D. 50. 17. upon all Occasions. ^{20. & 122.}

^p Slavery or Bondage is when a Person is subjected to the Domi- ^p I. 1. 3. 2. nion of another Person, contrary to his natural Liberty. ^q Either by ^q I. 1. 3. 2. the Law of Nations, when one is born of a Bondman, or when ta- ^{I. 1. 3. 4.} ken Prisoner in a just War; or by the Civil Law, when a Person sells himself into Bondage, or ^r is condemned to the Mines, or re- ^r I. 1. 16. 1. call'd into Bondage for Ingratitude.

Such is the Condition of a Bondman, that he is excluded the Benefits of the ^s Law. He cannot ^t marry, for his Conjunction with a ^s D. 4. 5. 3. Bondwoman is call'd *Contubernium* only. He cannot contract for ^t Exod. 21. 4. himself, and is esteem'd almost in the like State with one ^u dead. ^u D. 50. 17. He can act only in the Person of his Master, and whatever ^w he gains ^{32. & 209.} accrues to his Master, and he himself has no Advantage of it. But ^w I. 3. 18. 1. a Bondman may act for the ^x Benefit of his Master unknown to him, ^x D. 50. 17. though not to his Loss. All the time of his Bondage the Master ^{133.} formerly had an uncontroll'd Power of Life and Death over him by the Law of Nations; but because such Power was contrary to common Humanity, it was afterwards restrain'd by the Civil Law, and the Master was as liable to the Law for killing his own ^y Bondman, ^y I. 1. 8. 2. as for killing a Freeman or the Bondman of another. Notwithstand- ^{D. 9. 2. 23. 9.} ing a moderate and convenient ^z Punishment was always allow'd, ^z D. 1. 6. 1. and even a Liberty to ^a kill his Bondman upon great Provocations. ^a D. 45. 1. 96.

G g

The

^o Quoties dubia Interpretatio Libertatis est, secundum Libertatem respondendum est. D. 50. 17. 20.

Libertas inæstimabilis est. D. 50. 17. 106.

Libertas omnibus rebus favorabilior. D. 50. 17. 122.

^p Servitus est constitutio Juris Gentium quâ quis Dominio alieno contra Naturam subjicitur. I. 1. 3. 2.

^u Servi pro nullis habentur. D. 50. 17. 32. Servitutem mortalitati fere comparamus. D. 50. 17. 209.

^z Melior Conditio nostra per Servos fieri potest, Deterior fieri non potest. D. 50. 17. 133.

^a I. 1. 4. pr. The *Civil* Laws decree, that the Issue shall follow the Condition of the ^b Mother, as to Slavery or Bondage as well as in Bastardy; for if a Bondwoman be married to a Freeman, the Children shall be bond; and if a Bondman marrieth a Freewoman the Children shall be free.

But the Laws of England always adjudged the Children to follow the Condition of their Father; so that a Freeman begetteth free Children as well of a Bondwoman as of one that is free, and a Bondman none but those that are bond. Fortescue de Laudibus Leg. Angliæ, cap. 42. Lit. § 187.

By the Canon Law Slaves may marry, c. 1. & t. t. X. d. Conjug. Serv.

^c D. 49. 15. 5. If one was taken Prisoner in War, and was afterward freed from his Captivity, he had the ^c *jus postliminii*; and by a Fiction of Law he was supposed to have been always at Liberty, and never to have been made a Captive. ^d And if he died while a Prisoner of War, he was supposed to have died at *Rome* that very Moment in which he was first taken Prisoner.

This Fiction now is obsolete, because the State and Condition of the Person continues without Alteration.

This Learning in Reference to Freedom and Slavery is almost become useless amongst Christians; but between Christians and Mahumetans a great Part of those Laws are still in use.

Slaves may claim their Freedom as soon as they come into England, Germany, France, &c. Groenweg. Vinnius ad h. t.

Of a Person as
a Citizen.

II. A *Citizen* or *Denizen* is a Freeman of *Rome* or some other City subject to *Rome*; and is distinguished from a *Stranger*, because he did belong to no certain Common-wealth subject to the *Romans*; and where-ever he travell'd could only claim the Benefit of the *Law* of ^e *Nations*, having no Right to the Privileges or Laws of any particular Place. But by the ^f Constitution of *Antoninus* all Strangers have been naturaliz'd.

^g D. 49. 15. Every Person may ^g at his Pleasure chuse what Government he will live under, or if he pleases under none at all, to gain any Advantage by it. But if he ^h contracts in any Place, or commits any ⁱ *Crime* there, he subjects himself to the Laws of that Place. If he is once settled, may he not depart from the Community without Leave?

That the Inhabitants may not remove in Multitudes is certain, for the State could not subsist under such a Liberty; but it ought not to be denied to single Persons, if they discharge their Debts contracted there, and if the Publick doth not particularly stand in need of their Presence, &c.

Therefore in England the King by his Writ of Ne exeat Regno may stop any Person going out of the Kingdom, and make him give Security not to depart without his Licence.

A

^b Vulgo quæsitus ventrem sequitur. I. 1. 5. 19.

A Citizen is either by ^k *Birth* or *Election*. And this *Right* of ^k C. 10. 39. 7. a Citizen the Sons may derive from the Father, tho' the ^l Father was ^l D. 50. 1. 6. an Inhabitant in another Place. I mean *really* an Inhabitant; for ^l a Declaration before Witnesses that he claims to be an Inhabitant there, or tho' he has purchas'd an House there, ^m it does not make ^m D. 50. 1. 20. him *really* an Inhabitant. It is not absurd that a Man may be an Inhabitant of *many* ⁿ Places, where he divided equally his Time of ⁿ D. 50. 1. 1. Residence. 5. & 6. § 2.

See the English Statutes concerning the Settlements of the Poor. 13 & 14 Car. 2. ch. 12. 1 Jac. 2. ch. 17. 3 & 4 W. & M. ch. 11. 8 & 9 W. 3. ch. 30. 12. Ann. ch. 8. and ch. 23.

This Right of Denization is lost by the *media capitis Diminutio*, viz. when the Person is ^o *Deportatus*, that is condemned to perpetual Banishment, ^p or revolts over to the Enemy, or is declared an ^p D. 45. 5. Enemy by the Senate.

By the Law of England an Alien, i. e. one born out of the King's Ligeance, or under the Obedience of a strange Prince, cannot purchase Lands to his own Use; for the King shall have them by his Prerogative; neither can he purchase any Freehold or Lease for Years, &c. to his own Use; neither can he be Heir by Descent, tho' an Alien Friend. But such an Alien may maintain personal Actions; for an Alien Friend may Trade and Traffick, Buy and Sell, take a House for Habitation during his Residence as necessary for Commerce, if a Merchant; but he cannot maintain either real or mix'd Actions. An Alien Enemy shall maintain neither Real nor Personal Actions till the Nations are in Peace; for he hath no Right of Commerce while an Enemy. An Alien may be made a Denizen by the King's Letters Patents, or Naturalized by Act of Parliament, which is more perfect and effectual than Denization by Letters Patents. 1 Inst. 2. b. 8. a. 129. a. & b. 7. Rep. Calvin's Case.

Denization gives no legal Blood to the Children born before, nor to the Collateral Line of the Denizen. But Naturalization gives all the Privileges of a Subject born. By a late Statute, Natural born Subjects may inherit the Estate of their Ancestors either lineal or collateral, notwithstanding the Father or Mother were Aliens. 11 & 12 W. 3. c. 6. See also the Statute 7 Annæ ch. 5. where there is a general enabling Clause in the said Statute relating to Children of natural-born Subjects born out of the Ligeance of the Queen.

In France the King seizes the Estates of Aliens and Strangers (when they die) *jure Albinatûs*, i. e. *Alibi natorum*, unless they have a Privilege granted them to be exempt, as the Scotch, Dutch, Switzers, &c. or unless they marry a Native and have Children by her. Perez. in Cod. 10. num. 15 & 17. Gothofred. in notis sup. Auth. Omnes peregrini, &c.

III. The

^k Qui in Continentibus urbis nati sunt, Romæ nati intelligantur. D. 50. 16. 147. Urbis appellatio muris, Romæ autem continentibus ædificiis finitur, quod latius patet. D. 50. 16. 2. & 139. & 147.

Of a Person as
Master of a
Family.
¶ D. 50. 16.
195. 2. & 3.

III. The Word *a Family* has various Significations, but here it is taken for a certain Body of Persons of Kin to each other. This Notion does not include *Bondmen* or *Servants*, but the Kindred only. He that is the Head and Chief in the House is call'd *Pater-familias*, altho he is a Minor, and altho' he has really no Sons; but he is so denominated because of a future possibility: This is strictly called the *Family*. But it includes the whole *Kindred* too; whether of the same House or no.

¶ D. 38. 10. pr.

The *Kindred* is distinguished by *Lines*, either the *Right Line* or the *Collateral*. The *Right Line* is of Parents and their Children, computing by Ascendants and Descendants. The *Collateral Line* is between Brothers and Sisters and the rest of the Kindred amongst themselves. For when the Question is asked, how such Persons are of Kin? you must *ascend* to the Stock from whence both Parties sprang, and then *descend* collaterally and obliquely to find out the *Degrees*.

Agnatus is the Kinsman by the Father's Side, *Cognatus* by the Mother's; and both with Reference to Husband and Wife are *Affines*, because the two Families are brought *ad finem*, to a certain Point. In the old Law the *Agnati* did wholly exclude the Kindred by the Mother's Side from inheriting the Estate, and from Guardianships; but this Difference was afterwards taken away by *Justinian* in his *Novels*; whereupon both Degrees had an equal Right, the nearest of Kin indifferently to be prefer'd first.

¶ Nov. 118.

The *Civil Law* gives this Rule to find the Difference of Degrees both in the right and collateral Line, *viz.* That there are so many Degrees as there are Persons begotten, not reckoning the common Stock from which all descended. For example; first, in the right Line there is the Grandfather, Father, and Grandson. Now not computing the Grandfather, the Father being born makes one Degree, the Grandson being begotten by the Father makes the second Degree from the Grandfather. Then in the collateral Line, if it is ask'd how many Degrees I differ from my Brother? the nearest common Stock is the Father who begot me and made one Degree, then he begot my Brother and made the second Degree; so there being two Persons generated by the common Stock, I am distant from my Brother in the second Degree: So I am distant four Degrees from my Uncle's Son; for my Father begot me, making one Degree; my Grandfather begot my Father, which is the second Degree; the Grandfather begot my Uncle, which is the third Person begotten and the third Degree; my Uncle begot his Son, and makes the fourth Degree. This Method is to be observ'd in all other Computations of Degrees. ¶ And as they stand related by Nature, that Relation cannot be destroy'd by any Civil Law.

¶ D. 50. 17. 8.

But

^a *Pater-familias est qui in domo Dominium habet. D. 50. 16. 195. Matrem-familias accipere debemus eam quæ non inhoneste vivit. Nam neque Nuptiæ, neque Natales faciunt Matrem-familias sed boni mores. D. 50. 16. 46. 1.*

^b *Qui nascuntur Patris non Matris-familiam sequuntur. D. 50. 16. 196. 1. Mulier familiae suæ Caput & Finis. D. 50. 16. 195. 6.*

^c *Jura Sanguinis nullo Jure Civili dirimi possunt. D. 50. 17. 8.*

But it is observ'd, that the ^u Canon Law agrees with the Civil ^{C. ad sedem} Law in reckoning Degrees as to the right Line only. For in the col- ^{35. q. 5.} lateral Lines there is a Disagreement, in that the Canon stops in its Computation at the common Stock, and then this is the Rule, viz. In whatsoever Degree the Persons are distant from the common Stock, in the same Degree they are distant from each other. Here my Brother and I am distant but one Degree, for we are distant but one Degree from our Father, the common Stock from whence we descend. Here also from my Uncle's Son, I am distant but two Degrees, because we are distant but two Degrees from the Grandfather the common Stock, where we must fix in our Computation; though, as I said before, by the Civil Law I differ from my Brother two Degrees, and from my Uncle's Son I am in the fourth Degree.

This Method of Computation is by the Canon Law, where the Degrees are equal. But if the Degrees are unequal, that is, where one is nearer to the common Stock than the other, this is the Rule, viz. In whatsoever Degree the remotest Person is distant from the common Stock, in such a Degree the Persons are distant from each other; so I and the Grandchild of my Uncle being distant from each other by the Civil Law in the fifth Degree, by the Canon Law are distant only in the third Degree; for the Grandchild of my Uncle is distant but three Degrees from my Grandfather, which is our nearest common Root.

The Common Law of England computes the Degrees of Kindred according to the Canon Law. 1 Inst. 24. a.

IV. A Person in his Civil Capacity may be farther consider'd as ^{Of a Person as} an Husband, in whom an Authority over the Wife is lodged, if she ^{Husband or} is emancipated from the Power of her Father. He hath a Power ^{Wife.} over her Body, as the ^w Scripture speaks; he may command Service ^{w 1 Cor. 7. 4.} and Obedience from her; not in every Case, but only in such as are within the Limits of reverential Love and Duty. ^x He may give ^{x Nov. 117.} her moderate Correction. His Authority is gain'd by Consent, for ^{c 14.} by Nature there seems to have been a Parity of Power. He ought to defend her from ^y Injuries, because he himself is then injured as ^{y D. 47. 10.} well as the Wife. ^z She must follow him and enjoy all the ^{Privi. 1. 3.} leges and Honours of her Husband; which are retain'd after his ^{z D. 50. 1. 32.} Death as long as she remains a Widow. She is esteem'd to be of ^{& l. 38. § 3.} the same Countrey with him. If he is legitimate by Birth, he makes his Wife legitimate too, tho' she was born otherwise; yet she may ^b give and buy without the Consent of her Husband; but he ought ^{b C. 8. 56. 6.} not to be affected by her ^c Contracts or Debts, or Injuries; nor the ^{c C. 4. 12. 1.} Wife by the Debts or Act of the Husband.

By the Laws of England the Husband and Wife are esteem'd as one Person in Civil Cases, and have but one Estate. She is also disabled to contract without the Consent of her Husband; for if she is a sole Merchant, she is presum'd to have his Consent, as in the Contracts which she makes for what is necessary for her. They cannot give or grant to each other during the Marriage. 1 Inst. 112. a. The Husband may be prosecuted for the Debt of the Wife before Marriage, and Damages committed by the Wife; and in all these Cases, the Laws

H. h

of

of other Nations are almost the same with the Law of England. Groenw. in Cod. h. t. Vinnii. Com. lib. 1. tit. 25. § 19. *The Wife with us loseth her Dower for the Treason of the Husband.* 5 Edw. 6. ch. 11. but for no other Crime.

These are some of the Effects of Marriage or Matrimony, the Nature of which is to be consider'd more particularly.

^d D. 23. 1. 1.

^e D. 23. 1.

2 & 4.

^d *Espousals* precede Marriage, being a Contract of a Marriage *de futuro*. ^e This was formerly by *Stipulation*, now by Consent. They are made in such Words as these, or the like, I *will* take thee to Wife, I *will* take thee to Husband. In these *Espousals* if the Man departs from the Contract he loseth the *Arrha*, or Earnest, which was usually given to the Woman; and if the Woman fails, she shall return the Earnest which she received two-fold.

There are also *Espousals* by Words of the *present* Time, which are the same with *Marriage*, as by these Words, I *Titius* do take thee *Sempronia* to Wife, &c.

^f D. 23. 2. 1.

Espousals de presenti, or ^f *Marriage* is a *Conjunction* of Man and Woman in a constant Society of Living. By this Definition Polygamy and Concubinage are excluded.

This *Conjunction* does not infer a Communion of Goods; so that That depends upon the Custom of every Country. However it is one of the natural Foundations of Civil Society.

^g C. 8. 58. 1.

^g And formerly Persons that were not married had not so great Privileges as those that were; which has been abrogated by Christian Princes, probably at the Instigation of the Priests.

^h I. 1. 10. 1.

Those that are forbidden to marry, are, 1. Those that are too near of *Kin*; which if it is in a ^h right Line, the Prohibition is *in infinitum*, for else there would be a Confusion of natural Duties; nay by the Strictness of the *Civil Law*, that Kindred which is by Adoption (and not by Nature) in the *right* Line is forbidden, altho' the Bond of Adoption is dissolved. In the *collateral* Line those that are

ⁱ I. 1. 10. 2.

in the ⁱ *Place* of Parents and Children, as Uncle and Niece, Aunt and Nephew are prohibited.

The Marriage of Uncle and Niece (as that of Aunt and Nephew) is not expressly forbidden by the *Divine Law*, tho' it seems to stand upon the same Reasons. v. Levit. xx. 19. 20.

^k I. 1. 10. 4.

Brothers and Sisters, tho' not by the same Father or Mother, are indistinctly forbidden; as also one cannot marry an *adopted* Brother or Sister during the Continuance of the Adoption. But ^k *Cozen* Germans in the fourth Degree are allow'd to marry; tho' according to the Pleasure of the ^l *Emperor*, the Law has often varied in this Point.

^l C. 5. 4. 19.

By

^d *Sponsalia sunt mentio & repromissio Nuptiarum futurarum.* D. 23. 1. 1.

^f *Nuptiae sive Matrimonium est viri & mulieris conjunctio, individuum vitae consuetudinem continens.* I. 1. 9. 1.

By the ^m Canon Law Cozen Germans being reckon'd to be in the second Degree are prohibited, as also those in the fourth Degree which is the eighth Degree by the Civil Law. Therefore when it is vulgarly said that first Cozens may marry, but second Cozens cannot; probably this arose by confounding these two Laws; for first Cozens may marry by the Civil Law, and second Cozens cannot by the Canon Law. ^{m c. non debet de Affin. & Conf.}

2. Those are forbidden to contract Espousals or marry who are of too ⁿ near Affinity, as the Word is distinguish'd from Kindred. The Kindred of the Husband are not of Affinity to the Kindred of the Wife, and therefore the Husband's Brother may marry the Wife's Sister, as well as the Husband's Son by a former Wife may marry the Wife's Daughter by a former Husband. The Affinity is terminated in the Husband himself from the Wife's Kindred, and in the Wife herself from the Husband's Kindred. Therefore those cannot be joined who are in the ^o Place of Parents and Children, as a Father-in-law and ^o Daughter-in-law; or in the Place of Brother and Sister, as the ^p Wife and the Husband's Brother; for their Marriages are incestuous. ^{n I. 10. 6. D. 23. 2. 15. D. 23. 3. 39.}

Out of these Cases there is Liberty.

These Prohibitions of Collateral Marriages, tho' perhaps not forbidden by any natural Law, seem to be grounded upon this Reason, viz. lest by a daily and necessary Conversation, and unobserved Familiarity, Opportunities might be given to such Persons to commit Adulteries and Fornications amongst themselves; which now are restrained in some measure by a Declaration of the Unnaturalness of such Actions, and the inbred Aversion to them; or perhaps it was upon a political Account, that Commerce might not be restrained to particular Families.

3. Where there is a Defect of Mind, as in Infants or Madmen; where there is a Defect in Body, as if the Man is ^q castrated or frigid, or if the Woman is (^r nimis arcta) unfit for Procreation; till these Defects are removed, Matrimony is forbidden. But as to Age, ^r Women may marry after twelve Years compleat, and the ^r Man after fourteen; otherwise, if they are married before, either may dissent at that Age. ^{q D. 23. 3. 39. r c. Paternitatis, de Frigidis & Maleficiis. D. 33. 1. 2. 4. Nov. Leonis 109.}

Pro bono pacis, Two Princes may match their Children under this Age, and the ^u Canon Law will confirm it; but ^v the Canon Law does not so much regard the Age as the Ability. ^{u c. ubi de Dispensatione. Im-puberum. w c. Puberes. & cap. fin. eod. x I. 1. 10. 9. y D. 23. 2. 42.}

4. ^x Publick Honesty, or Decency, persuades from some Marriages, y though it does not expressly forbid them. So I ought not to marry my Wife's Daughter, though she was begotten by another Husband, long after I was divorced from her Mother.

The Law also forbids the Marriage of a ^z Guardian, or of his Son or Grandson with his Minor, unless the Guardian's Accounts have been first given up within a certain Time and approved; as also of a ^a Governour of a Province with a Woman under his Jurisdiction; ^{a D. 23. 2. 63. of}

^x Semper in Conjunctionibus non solum quid liceat considerandum est, sed quid honestum sit. D. 50. 197. Non omne, quod licet, honestum est. D. 50. 17. 144.

^b C. 5. 4. 26. of a ^b Godfather with his God-daughter; a ^c Christian with a Jew.
^c C. 1. 9. 6. And heretofore Matrimony was forbid between a ^d Senator and a
^d D. 23. 2. 44. *Libertine*, or other mean Person; and between a Man of threescore
^e Nov. 78. c. 3. with a Woman of fifty. ^e But the two last Prohibitions are now
^e C. 5. 4. 27. taken away.

Neither are any of the other prohibitory Laws observed. Vinnii.
 Com. lib. 1. t. 10. § 11. Groenw. de LL. Abrog. ad l. 23. Cod. de
 nuptiis.

^f C. 5. 8. 1. Yet when the Prohibition is by a particular Constitution only,
 & 2. there the Persons may be joined by the special ^f Dispensation of the
 Magistrate. In Prohibitions founded upon Nature there is no Dis-
 pensation.

*In England, by 32 H. 8. c. 38. all Marriages are adjudged lawful
 that are not prohibited as within the Levitical Degrees, or otherwise
 by God's Law.*

^g D. 50. 17. 30. *Esponsals de presenti*, or Matrimony is contracted by ^g Consent
 Deut. xxii. only, without carnal Knowledge.
^g 23, 24.

^h c. Aliter. *Although the ^h Canons, the Greek Constitutions, and the Customs of
 Caus. 30. q. 5. some Countries require the Sacerdotal Benediction.*
 Concil. Tri-
 dent. Sessioe
 8.

ⁱ D. 23. 2. 2. ⁱ There must be the Consent of the Persons contracting, and of
^k D. 23. 2. 16. the Parents (the Consent of the Mother is not necessary) if the
^l C. 5. 4. 18. Children are not *emancipated*, and out of their Power. If the ^k Fa-
 & 20. ther is under the Power of the Grandfather, the Consent of both is
^m D. 23. 1. 12. requisite. But if the ^l Woman, *Widow* or *Virgin*, is under twenty
ⁿ C. 5. 4. 20. five Years of Age (although she is emancipated, she must be *wholly*
 under the Direction of her Father, ^m unless he command Obedience
 to an improper Marriage; and after his Decease, she is under the
^o I. 1. 10. pr. Controul of her Mother; but if the ⁿ Mother is froward, and dis-
 sents without Reason, the Magistrate may interpose upon Complaint.
 This Consent must be *precedent* to the Marriage, or ^o at the very
 Time, for an Agreement and Confirmation afterwards is not suffi-
^p C. 5. 4. 5. cient. But if the Father is present, and does not contradict, his
 Num. xxx. Silence shall be presum'd a Consent. [See pag. 104. ante] And un-
 4 & 5. less there is this Consent added, it is to be accounted no Marriage,
^q D. 1. 5. 11. and the Children are to be reputed ^q illegitimate; which is to be
 understood rather as to their Claims of Civil Rights and Advantages
^r D. 43. 30. 1. arising from it. For it seems more ^r prudent not to dissolve the Ties
 5. of Nature.

^s c. Sufficiat
 30. q. 5.

*Upon this Consideration, the later ^s Canons require the Consent of
 Parents; but do not make it of absolute Necessity, that the Marriage
 should be adjudg'd null for want of it.*

*The English follow the Pontifical Law, and by Statute only punish
 the Parties, and the Minister that marries them without Licence
 from*

^s Nuptias non concubitus sed consensus facit. D. 50. 17. 30.

from the Ordinary, or Publication of Banns in the Church. Vid 7 & 8 W. 3. c 35. But I think the Civil Law gives the wisest Determination.

In France Marriages are prohibited and null without Consent of Parents, with Respect to Sons till thirty Years of Age, and to Daughters till twenty five. Les Loix Civiles, tom. 1. tit. des dots, § 2. But in Holland, the Sons at twenty five, and the Daughters at twenty Years of Age, may marry without their Consent, if the Parents can't give good Reason to the contrary. Vinnii Com. in Inst. lib. 1. l. 10.

The Law of England, though it allows the Male Discretion enough at fourteen to chuse a Wife without Consent of Parents, yet it will not allow him to have Discretion enough to buy and sell, or to settle any Part of his Estate on his Wife till the Age of twenty one. And if a Woman Child above the Age of twelve Years, and under sixteen, having an Estate in Lands and Inheritance, contract Matrimony without the Consent of Father or Guardian, that Inheritance shall go to the next in Remainder or Reversion. 4 & 5 Ph. & Mar. cap. 8.

From hence we may conclude, that if there is any Force, Fear, ^{C. 5. 4. 14.} Madness, or Drunkenness, whereby the Persons are wholly bereaved of their Senses, or if there is any Mistake; the Marriage is void; for I said before; that the Consent of the Persons contracting was necessary; which Consent cannot be supposed in such Circumstances. ^{V. p. 105.} ^{D. 23. 2. 18.}

The Plea of Force or Fear will not be allow'd for every light Matter, ^w nor for a Reverential Fear, lest the Father should be displeased. ^x It must be such a Fear that may be thought to prevail upon Persons of Courage and Prudence. Such is the Fear of Death, or Imprisonment. ^{D. 23. 2. 22.}

In the Laws of England, it is Felony without Clergy to carry away a Woman, Wife, Widow, or Maid, against her Will, having Lands or Goods, or being Heir Apparent to her Ancestor; and afterwards to marry or defile her. 3 H. 7. c. 2. 39 Eliz. c. 9. And by the 18 Eliz. c. 7. it is Felony without Clergy to have the carnal Knowledge of a Girl under ten Years of Age, though with her Consent.

The Mistake must also be in the substantial Part of the Marriage, ^{V. p. 104.} as when I mistake the Person and marry Titia instead of Sempronia. A Mistake in the Quality of the Person or the Fortune will avail nothing; for it will be imputed to your Neglect and Fault for not making better Enquiries. ^{D. 50. 17. 19.} If I marry a Strumpet instead of a Virgin there is no Relief, because of the ill Consequences which may ensue, if such Pretences are hearken'd to.

Otherwise by the Divine Law. Deut. xxii. 13. cum seqq.

I i

z A

^w Velle non creditur qui obsequitur imperio Patris vel Domini. D. 50. 17. 4.

^y Qui cum alio contrahit, vel est, vel esse non debet, ignarus Conditionis ejus. D. 50. 17. 19.

² A *second* Marriage in Man or Woman is condemned, though not absolutely forbidden. The Prohibition is for the sake of the Children in the first Marriage, which the Law suspects may be injured and neglected by the second Marriage, and therefore the Man and Woman are liable in this Case to several ^a Punishments.

^a C. 5. 9. paf-
sim, fed vid.
Nov. 22. c. 2.
^b Ibid.

The Woman is forbidden to marry (*infra annum luctus*) within the Year of her Husband's Death (unless there is a Dispensation from the Prince) because of the ^b Uncertainty to which Husband the Issue may belong, and because a reverential Mourning and pious Regard to the Memory of her deceas'd Husband is in Decency expected.

The Divine Law and the Canons leave no such Injunction. 1 Cor. vii. 39. c. 4. & 5. de secundis nupt.

By the Laws of England, if a Man hath a Wife and dieth, and within a very short Time after the Wife marrieth again, and within nine Months hath a Child, so as it may be the Child of the one or the other, it is affirmed that the Child may be Heir to which Father he pleases. 1 Inst. 8. a.

^c D. 23. 1. 4
& 5 & 8.

Matrimony may be contracted between Persons ^c *absent* by Proxies or Letter, as well as by the Parties themselves; and it is lawful for the *Proxenate* Matchmakers to receive a ^d Reward for their Pains.

^d C. 5. 1. 6.

^e I. 1. 10. 6.
^f C. 5. 27. 1.

It is not lawful to have ^e *two* Wives at the same Time, nor a ^f *Concubine* with a Wife.

This was not contrary to Nature or the Law of the Old Testament. Deut. xxi. 15. 2 Sam. xii. 8.

^g D. 25. 7. 3.
fed. vid. Nov.
Leon. 91.

It was permitted by the ^g Civil Law to those that had no Wives to keep one Concubine for the Avoidance of a greater Evil.

But these Permissions are condemned by the New Testament and the Canons. Matth. xix. 8. Mark x. 8. 1 Cor. vii. 2 & 3. cap. nemo sibi. 32. 4. 4.

Marriages that have been clandestinely solemnized, i. e. by not observing the due Solemnities of the Church, are condemned by the Canon Law, tho' not made void. cap. quod nobis. tit. qui filii sunt legit. See 7. & 8. W. 3. ch. 35.

^h C. 5. 4. 9.
ⁱ c. illud de
præsumpt.
^k c. Affecta-
tiones. de De-
spons. impud.

The *Proof* of a Marriage may be by ^h Witnesses who were present at the Solemnization; by ⁱ Cohabitation of the Parties; by publick Fame and Reputation; by ^k Confession of the married Persons themselves, although their Acknowledgment was only to avoid the Punishment of Fornication; and by divers other Circumstances, which if they amount to a half Proof ought to be extended in favour of Marriage rather than contrary to it.

The

² Hoc sermone Dum nupta erit, Primæ Nuptiæ significantur. D. 50. 16. 89. 1.

The Marriage being legal, *Portion* and *Joynture* ensue. ¹ *Dos*, a ¹ C. 5. 12. 20. ² D. 23. 3. 35.
Portion, is that Estate which is brought by the Wife (or given by some other Person for her) to the Husband to support the Charge of a married Life. This may be given before or after the Marriage, and the ^m Father may be forc'd by the Magistrate to give a Portion ^m D. 23. 2. 19. with his Daughter according to his Estate and Ability.

There is no such Obligation by the Laws of England, neither is this Law observed beyond Sea. Groenw. de Legibus Abrog. in Cod. lib. 3. tit. 28. l. 19.

The Woman is not constrained to bring her ⁿ whole Substance as ⁿ D. 23. 3. 9. a Portion to her Husband, but may retain back part of her Goods; ³ which are then called *Paraphernalia*, in which the Husband has no Interest; ^o for she may dispose of it without his Consent, and bring ^o C. 5. 14. 11. Actions in her own Name, or in the Name of the Husband, for the Recovery of it.

In England we account the Paraphernalia to be only the Womans wearing Aparent, Jewels, and personal Ornaments which she wore during her Marriage, suitable to the Quality of her Husband. Vide the Law of England post. Of Gifts. Book. 2. ch. 4.

Donatio propter Nuptias (^p formerly called *ante Nuptias*) a *Joynture*, is a Security assigned by the Husband to the Wife for her Portion; besides which she has a tacit ^q Mortgage in all the Goods of her Husband, and is to be prefer'd before all other Creditors when the Marriage ceases, though their Mortgages are of an ancients Date. ^{PI. 2. 7. 3.} ^q C. 5. 12. 30.

This seems to be unjust and void of Reason, and it is not observed in England, nor in Spain, or Holland. Perez. prælect. in lib. Cod. 8. tit. 19. Num. 22.

The ^r *Joynture* is to be of the same Condition and Quantity with ^r Nov. 97. the Portion, and if the Portion is return'd after the Dissolution of the Marriage, the Wife also must return the Security.

During the Marriage the Husband receives the ^r Profit of the Portion, ^r unless he declines, and begins to grow low in his Fortune; ¹ Nov. 97. ^{c. ult.} and then even during the Marriage, the Wife by Law may seize her Portion or Security, or bring her Action against him and lodge it out of his Reach; for the *Property* of the Portion is not transfer'd from the Wife by the Intermarriage. ¹ C. 5. 13. 17.

Vid. post. Book 2. ch. 4.

Marriage is *dissolv'd* by the natural *Death* of either Party, or by *Divorce*.

If the ⁿ Husband is in *Captivity*, and it is certain that he is in the Hands of the Enemy, the Wife ought not to marry again, or con- ⁿ D. 24. 2. ⁶ Nov. 22. clude ^{c. 7.}

¹ In Ambiguis pro Dotibus respondere melius est. D. 50. 17. 85. Reipub. interest mulieres dotes salvas habere propter quas nubere possunt. D. 23. 3. 2.

clude that he is dead, till she has receiv'd *certain* Information; but if it is uncertain whether he is a Prisoner or no, after five Years Expectation the Wife is not punishable if she takes another Husband.

By the Laws of England it is Felony to marry a second Husband or Wife, the first being alive, even after seven Years Absence in any Part of the King's Dominions, the one of them knowing the other to be living. But if either Party is beyond Sea for seven Years, no Felony to marry again, though Notice of being alive. 1 Jac. 1. 11. 3 Inst. c. 27.

And then if the first Husband should return, he cannot by Reason of the second Marriage ^w refuse his Wife, because he was somewhat in Fault for being so long absent, and for not giving Notice that he was alive. But ^x *Justinian* afterwards

[*And the Canons, c. in præsent. de sponsalibus*]

required a certain and positive Proof of the Death of the former Husband, before the Woman was suffered to enter into a second Marriage.

By *Divorce* the Marriage Knot is untied, either by the Consent of both Parties, or by the *Act* of one only. By the Law of the *twelve* Tables a mutual Consent could destroy the Marriage as a mutual Consent at first made it. But ^z *Justinian* permitted it only where both Parties agreed to separate, that they might live singly upon the Score of Chastity only. Yet see *Nov. 140.*

Whereas the Canons have wholly taken away that Liberty. c. ex parte. de transact.

By the ^a *Act* of one of the Parties the Marriage is destroy'd, as where one is guilty of Treason; where one may justly charge Adultery upon the other, and the accused Person cannot justly recriminate; where there is irreconcilable Hatred; ^b intolerable Cruelty; ^a Design of Murder upon the other; when the Wife through Wantonness shall wash and bath amongst Men; when the Husband shall become *Pander*, and tempt his Wife to Lewdness for Gain; when one Party shall unjustly forsake and live apart from the other.

But again the Canon Law does interpose, and will not permit in any Case the Dissolution à Vinculo Matrimonii, though the Divine Law does permit it on the Part of the Husband, at least in one or two Instances. Deut. xxiv. 5. Matth. v. 32. 1 Cor. vii. The Law of England is agreeable to the Canons. 1 Inst. 235. a. Of late, in Cases of Adultery a total Separation from the very Bonds of Marriage has been indulg'd by particular Acts of Parliament.

Of a Person as
a Father or
Son.

V. The Relation between ^c Parents and their Children is another natural Foundation which God hath laid for Civil Society. Now the

^c *Appellatione Parentis non tantum Pater, sed etiam Avus & Proavus continentur, & Mater & Avia & Proavia. D. 50. 16. 51.*

the Right of a Father is acquired three Ways, viz. by Marriage, by Adoption, by Legitimation.

1. By Marriage the Power of a ^d Father is acquired over his Son, ^d I. 9. pr. if he is born in Wedlock. But he is not so under the Power of the ^e Mother; for she herself is under Authority; though by all means ^e D. 50. 16. the Son ought to pay her Respect and Obedience. 195. 4.

A Son by a Concubine is not under the Jurisdiction of the Father, but follows the Mother. In which Case the Rule ^f *Partus Ventrem* ^f D. 1. 5. 19. *sequitur* is to be understood as well as in relation to Bondage; for [&] 24. the Father is presum'd to be unknown.

2. By Adoption, which is a lawful Act by which those that are not my Children are made so by Law and the Authority of the Magistrate, with the Consent of the ^g natural and lawful Father and of ^g C. 1. 11. 2. the Children themselves. The adopting Person must be of a proper Age to be a Father, and eighteen Years at least elder than the Person adopted; for ^h Adoption must imitate Nature. ^h I. 11. 4.

In England and in our neighbouring Nations there are no Laws in Use concerning Adoption; but by Agreement a Kind of Adoption may be amongst private Persons. Groenweg. de Legibus Abrog. Inst. l. 1. tit. 11.

In Germany there is a Sort of Adoption, where Children by former Marriages are by the Decree of the Magistrate and Consent of Husband and Wife, Relations and Friends, united and joined, that no Distinction is to be made amongst them in Regard to Succession, &c. Gail. l. 2. Observ. 125.

3. By Legitimation, which is a legal Act, making my illegitimate Children legitimate. ⁱ This was either by offering and entring them ⁱ I. 1. 10. 13. in the Curia or Ward-meetings; or by subsequent Marriage with a Concubine; or else by the ^k Rescript of the Emperor. ^k Nov. 89. c. 9.

This Power of the Prince is not practised at this Day; neither can I apprehend that there is any thing like that Legitimation which was per Obligationem Curiae in Use with us or our Neighbours. As to a Legitimation by a subsequent Marriage with a Concubine, it was endeavour'd to be made Part of the Laws of England, but it was rejected in Parliament. Fortescue de Laudibus Legum Angliæ, c. 39. Though the Canon Law allows farther than the Civil Law, and suffers a subsequent Marriage with one that did not live as a Concubine to be a Legitimation. c. conquestus est X. tit. qui filii sunt legitimi. And this is the Law in Germany. Gail. 2. observ. 141. n. 8. and allow'd in Holland with a Dispensation. Vinnii com. hic.

Formerly the ^l Father had Power of Life and Death over his ^l C. 8. 47. 10. Children, but now only the Power of moderate Correction. ^m If ^m C. 8. 47. 3. the Crimes of the Children are extraordinary, the Magistrate may inflict the Punishment.

K k

By

^a Pater est quem Nuptiæ demonstrant. D. 2. 4. 5.

^e Falsum est eam peperisse cui mortuæ Filius exsecutus est. D. 50. 16. 132. 1.

^f Ter enixa est quæ Tergeminos peperit. D. 50. 16. 137.

^g Vulgò quæsitus ventrem sequitur. D. 1. 5. 19.

^h Patria potestas in pietate debet, non in atrocitate, consistere. D. 48. 9. 5.

By the Divine Law Death may be the Punishment of a disobedient Son. Deut. xxi. 18, 19.

ⁿ C. 8. 47. 9. ⁿ As the Father is bound to educate the Son according to his
^o D. 25. 3. 5 Ability, at least with all those Things which are ^o necessary for a so-
 & 12. cial Life, so the Father for his own Support in Time of Famine
^p C. 4. 43. 2. might formerly sell his Son into Bondage, but upon Condition that
 if he restored the Price afterwards, his Son should be returned. The
 Authority of a Father over a Son is gain'd by Generation, for he is
 the Cause of his Being!

The Father and Mother ought not only to educate and support
^q D. 25. 3. 8. their own Sons and Daughters, ^q but their Grandchildren; ^r and so
^r D. 25. 3. 5. if by Reason of Sicknefs or Poverty they want their Relief, and can-
 not maintain themselves. It makes no ^s Difference if those Chil-
^s D. 25. 3. 5. dren descend from Sons or Daughters, from the Male or Female
^t 1. 2. 3. 4. 5. Line.
 6.

In the same Manner *Children* are bound to relieve their Parents,
^t D. 25. 3. 5. 16. &c, but not obliged to pay their ^t Debts; ^u tho' if they are impri-
^u Nov. 115. 3. son'd for Debt, a Son ought to be Bail for them. And if there are
^v D. 26. 7. are no such Parents, a ^w Brother is bound to relieve his poor Sisters,
 13. 2. but no farther.

V. 43. Eliz. ch. 2. § 10.

^x D. 25. 3. 5. ^x *Children* are presum'd to be the Off-spring of that Father who
 1. 12. acknowledges them; especially if they are esteemed and reputed to
 cum seqq. be the Children of such a Father by the Neighbourhood.
 D. 1. 6. 6.

If a Child is born of a Wife while the Husband hath been absent
^y D. 1. 6. 6. some Years from her, or if a Child is conceived and born during
 such ^y Sicknefs or Infirmary of the Husband, that he could not pos-
^z D. 25. 3. 5. sibly be the Father of it; it is not his Child, tho' he was conversant
 8. all the Time with his Wife in the same House, ^z neither is he obliged
 to maintain it.

*By the Law of England if the Husband remain within the four
 Seas, that is, within the Jurisdiction of the King, if the Wife hath
 Issue, the Child is no Bastard, and the Husband is bound to maintain
 it, unless the Husband had an apparent Impossibility of Procreation,
 as if the Husband be not eight Years old. If the Child is born within
 a Month or a Day after Marriage, the Child is Legitimate.* 1 Inst.
 244 a.

^a D. 25. 4. If a Woman denies that she is with Child and the Husband affirms
^b 1. 2. 3. 4. it, she may be conven'd before the *Prætor*; who shall ^a appoint
 cum seqq. the House of some discreet Matron, that she may be inspected by
 three skilful Midwives to be chosen by the *Prætor*, not by the Hus-
 band;

^a Liberatorum appellatione Nepotes & Pronepotes & cæteri qui ex his descendunt continentur.
 D. 50. 16. 220. & 56. 1. & 220. & Sect. 2. Filii appellatione omnes Liberos intelligimus
 D. 50. 16. 84. Et Filiorum appellatione omnes qui ex nobis descendunt continentur. D. 50.
 16. 220. 3.

band; where if two of the Midwives agree that she is with Child, she must be committed to such Care and Custody as the Husband shall appoint.

If a ^b Woman upon the Death of her Husband pretends to be with Child, she ought to acquaint those with it twice every Month, whose interest is to be prejudiced by the Birth, that they may also send Women to inspect her, and Men to be a Guard over her in a Chamber to which there is but one Passage and three Lights at the least, and that they may see the Child when it is born. ^b D. 25. 4. § 10. cum seq.

In the Laws of England there is also the Writ de Ventre Inspiciendo. Reg. Orig. 227.

The Education of it is to be where the Father shall appoint, but the Child must be shewn frequently till it can speak.

Whatsoever Estate the Son acquired he could not call it his own, but almost all of it formerly belonged to the Father. Afterwards the Father had only that which the Son raised out of the Father's Estate (called *Peculium Profectitium*) and the Profits only of the Son's Estate (called *Peculium Adventitium*) while the Property of it continued in the Son himself. But of the *Peculium Castrense* which the Son got in War, or *quasi Castrense* which the Son got in the Profession of some liberal Art, &c. the Father had neither the Profits, Property or Title. ^c I. 2. 9. 1. 2.

The Father had this Interest over the Son's Estate, because the Romans supposed them to be as one Person.

But the Laws of England make no such Supposal, and do not allow the Father such Power. If the Son has any Estate, the Profits of it belong to himself, and if the Father receives them, he must account for them to the Son. Bracton. l. 2. c. 5. *And this is the Law and Practice beyond Sea, except in Friezeland, and in France, where by Custom in some Provinces they come near to the Roman Law.* Loix Civiles, &c. 3 Tom. Tit. 2. Sect. 2. Vinnii Com. Lib. 2. Tit. 9. Sect. 1.

The Paternal Power is dissolved, 1. By the Paternal or Civil Death of the Father or Son. 2. By *Emancipation*, which vacates all Civil Claims; but not the natural Right. 3. By the Son's acquiring such a *Preferment* or *Dignity* which advanced him amongst the Romans *extra Curiam*; many of which Offices are mention'd in the ^d Novels.

VI. One may be ^e forced to be a Guardian, because it is reputed an Office of a publick Nature. And if it is made an Office of ^f private Profit, it is contrary to the Intention of the Law; & altho' upon a just Reason a Salary may be appointed by the Magistrate. ^d Nov. 81. c. 1. Of a Person as a Guardian. ^e D. 26. 7. 1. ^f D. 26. 8. 58. ^g D. 26. 7. 33. 3.

There is a Tutor and a Curator. ^h The first is Governour principally of the Person of the Minor, and secondarily, of his Estate; the

^h Tutela est vis & potestas in Capite Libero ad tuendum eum qui propter aetatem suam se defendere nequit. D. 26. 1. 1.

the latter is *principally* of the Estate of the Minor, and *secondarily* of the Person.

Amongst us and our neighbouring Nations this Distinction is neglected. Tutor or Guardian is the common Word. The Minor is full of Age with us at one and twenty, in other Countries not till twenty five. See pag. 102. ante.

But though Guardian's *assign'd* are forced to accept of this Office, yet every Person is not *capable* of it; for some are forbidden, ⁱ as those that desire and seek after it; the ^k Debtors or Creditors of the Minor; ^l deaf, dumb, and blind Persons; a ^m Father-in-law; ⁿ Minors and Madmen till the Impediments are removed; Prodigals, ^o Women (for it is an Employ fit for Men only) except the ^p Grandmother or Mother; for their Authority over the Minor, and their Affection for his Interest, gives them an especial Qualification.

By the Law of England none of these Persons are simply and absolutely incapable to be Guardians, except Minors or Madmen.

^q C. 8. 15. 6. If the Mother is a Guardian, and marries a ^q second Husband before she hath passed her Accounts, the Estate of the second Husband shall stand as a Pledge and Security for the Minor.

^r I. 1. 25. 16. Others may be ^r excused from this Office, either of Tutor or Curator, if the Excuse is pleaded within fifty Days after the Appointment. Some of the Excuses pleadable are, a Number of Children of their own alive, *viz.* either three at *Rome*, four in *Italy*, or five in the Provinces. Those ^s Children who died in Battle in Defence of their Countrey are reckon'd always alive. Also an Employment about the Prince's Revenue, Absence upon the Account of the Commonwealth, the Burthen of three Guardianships already before this last Appointment, great Poverty, Unskilfulness in Letters, Age of seventy Years, the Profession of the liberal Arts, ^t Holy Orders, &c. were sufficient Excuses.

^u I. 1. 14. Tutelage is either *Testamentary* by *Law*, or *Dative*. ^{1st}, ^u *Testamentary*, when the Father [or ^w Mother] assign'd to his or her Child, born or *to be* born, a Tutor by his or her *Last Will and Testament*, either for a certain Time or upon Condition, &c. ^{2^{dly}}, Or Tutelage is assign'd by the ^x *Law* only, when for want of Appointment by Will, the Law casts the Guardianship upon the Kinsman next in Succession, if he is qualified for it, ^y presuming that he would take the greatest Care of the Estate who was to succeed in it.

By the Laws of England, the next Friend of that Heir to whom the Inheritance cannot descend, shall have the Wardship of the Land in Socage, and of the Heir until fourteen Tears of Age. For if the Land descend to the Heir of the Part of the Father, then the Mother or other next Cousin on the Part of the Mother shall have the Wardship, &c. Lit. § 123. For our Law concludes, if the Tuition of an Infant is committed to him that is to succeed in his Estate, that it is as absurd as to commit a Lamb to the Custody of a Wolf. Fortescue de Laud. Leg. Angl. cap. 44. In most Countries at this Day, all Tutelage is either Testamentary or Dative by the Magistrate. Greonw. de Legibus abrog. lib. 1. tit. 15.

3^{dly}, Lastly, The third Kind of Tutelage was *Dative*, because it ^a I. 1. 20. was given and assign'd by the Magistrate, *ex officio*, or upon *Petition*, when a Guardian by *Will* or *Law* was not provided. And though a Guardian is appointed by the Will of the Father, if the Magistrate does not ^a approve of him, he may nominate some other ^a D. 26. 7. 3. 3. without any Necessity of recommending the next of Kin.

So in France all Tutelages are in a manner Dative, and the Kindred of the Minor may nominate another, and the Magistrate will confirm the Choice, and administer to him the Oath. Les Loix Civiles, &c. h. t. tom. 2. tit. 1.

These ^b Guardianships continued till the Male was *fourteen* Years ^b I. 1. 22. of Age, and till the Female was *twelve*. And if the Tutor pleased, a Curator might supply his Place upon a temporary ^c Absence or ^c I. 1. 23. 3. Excuse.

Curators regularly were assign'd by the Consent of the Minors at the Age of ^a fourteen, till the Age of *twenty five*, either for some ^d I. 1. 23. particular Part, or over the *whole* Concern. By their Consent it must be, unless they have a Tryal at Law as Defendants either with their Tutor, or a *Stranger*; in which Case a ^e Curator will be forced ^e I. 1. 23. 3. upon them by the Magistrate.

An Appointment also of a Curator might be by the Magistrate to Persons after full Age; but here without requiring their Consent. ^f Such are Madmen, Prodigals, & deaf and dumb Persons, and those ^f D. 27. 10. 1. which are afflicted with incurable Diseases that incapacitate them to ^g I. 1. 23. 4. manage their own Affairs. ^h If a Son not emancipated falls mad, the ^h C. 5. 70. 7. Father is the Curator of course; ⁱ but the Husband ought not to be ⁱ D. 27. 1. 14. a Curator to his Wife if she is mad; probably for fear he should dispose of her Joynture.

Otherwise in Practice. Groenw. de LL. Abrog. in Inst. h. t.

But let the Judge be very circumspect; for sometimes these *Infirmities* are feigned for private Advantages.

Curators may be assign'd over the Estates of ^k Debtors, and of ^k D. 42. 7. 2. Persons dead ^l without Heirs, and to ^m the Estates of Persons absent ^l D. 42. 4. 8. on long Voyages. ^m D. 26. 1. 6. 4.

The Common Law of England appoints no Curators in these Cases.

In France Widows (that have Children) marrying below their Quality, are interdicted to alienate their Estates, and have Curators assign'd them. Les Loix Civiles, &c. 2 tom. h. t.

In the Administration of the Tutelage and Curatorship, the Tutor and Curator must make an ⁿ Inventory of all the Estate of the Minor, ⁿ C. 5. 37. 24. with the respective Values of every particular, subscribed and attested by a publick Notary and Witnesses. Then he must take an ^o Oath that he will be true and faithful in his Administration; and he ^o Nov. 72. c. 8. must give Bayl and ^p personal Security to surrender up the Estate, ^p I. 1. 24. cum when the Guardianship shall be determined. Tho' there is no per- ^{seqq.} sonal Security, yet all the Goods and Estate of the Guardian is tacitly hypothecated and engaged for his Fidelity. This Security is to be
L 1 constantly

constantly given by those Guardians which the Law only does assign; for it is not required from Guardians appointed by Testament, or by the Magistrate upon Inquisition. For the *Testator* and the *Magistrate* by such a Designation have already approved of their Honesty. But these two may sometimes be forced to give Security; as when there are many Guardians, and one of them proposeth to the rest, either that they would give Security themselves, or give up the sole Administration to him upon *his* Security.

^q D. 26. 7. 2. This Administration is exercised in ¹ *educating* the Person of the Minor according to his Quality, either at the House of his *Mother*, unless she marries a second Husband, or in some other Place by Decree, as also by giving *Authority* and *Consent* to the Acts of the Minor, where there is occasion for him to be concerned in any Undertaking.

³ C. 5. 49. ¹ The Tutor can give an ¹ *Authority* only, and the Curator a *Consent*; so that a Tutor must be personally present in the very Agreement of the Minor to give it Life, otherwise it cannot take Effect. But the Consent of the *Curator*, either *before* or *after* is sufficient, for the Act of a Minor under a Curator is only voidable not void.

This Nicety is not observed in Practice. Groenw. de Legibus Abrog. in I. tit. 21.

^{*} Ibid. If the Minor makes an *advantagious* ^{*} Contract in buying and selling, &c. he may act without his Guardians, and may bind another, tho' he is not bound himself; unless in the Acceptance of an Inheritance by Will, though profitable to him, because he must then be bound to the Creditors and Legatees. But if any Agreement is to his *Disadvantage*, it is ^{*} null and void, unless the *Authority* of the Tutor, or *Consent* of the Curator intervene. Neither the Tutor nor Curator can contract with their Minor; for there is great Suspicion of Fraud; but a Tutor and Curator may be ^u assigned for that Purpose.

¹ D. 50. 17. 189.

^u I. 1. 21. 3.

By the Laws of England these Contracts are only voidable, if the Minor pleases, when he comes to Age. The Authority of the Tutor is not material.

^w D. 16. 63. There are some Cases where the Minor may be bound without his Tutor, as where by ^w Deceit or Trick he grows richer by his Contract; or when in ^x Partnership his Partner has laid out Money upon the common Stock, &c. In which Cases, if the Minor does not perform his Part of the Contract, he shall not make any Claim upon those who are concerned with him; ^y though in other Cases he may bind the adverse Party by his Contract, and not be bound himself. But here they may force him by Action to a Restitution.

¹⁵ D. 44. 7. 46.

^y I. 1. 21. pr.

No such Action known in the Laws of England.

As to the Management of the Minor's *Estate*, it consists in the safe Custody of those Things which will not be the worse for keeping,

^{*} *Pupillus nec velle nec nolle in ea ætate, nisi adposita Tutoris Autoritate, creditur.* D. 50. 17. 189. *Pupillus pati non posse intelligitur.* D. 50. 17. 110. *Pupillus omnia Authore Tutore agere potest.* D. 50. 17. 5.

ing, and in ^a selling those Things which are likely to perish; ^a but the Guardian ought not to buy any thing himself of the Minor. The Guardian ought to put the Minor's Money out to Use, ^b if there is a ^b Conveniency, or lay it out in Purchases: He ought to receive and pay his Debts, &c. All which shall be accounted to be the Act of the Minor when he comes to Age. ^c D. 5. 37. 22. ^d D. 26. 8. 5. 2. ^e C. 5. 56. 3.

In France the Money of a Minor is laid out, and Purchases made by the Tutor with the Advice of the Kindred. Ordonance d'Orleans, art. 102. Les Loix Civiles, &c. h. t.

But it is thought reasonable to barr the Guardian from alienating any real Estate, or moveable Goods of any extraordinary Value without the ^c Decree of the Magistrate. Therefore if the Guardian is any way ^d negligent or faulty in a right Administration; as if he keeps the Money of the Minor ^e unemployed, when it might conveniently be laid out, he himself shall be liable to pay the Interest; for it shall be presum'd that he converted it to his own Use; ^f and he shall be answerable for those Advantages which he might have made. ^g If he brings vexatious Actions knowingly, he shall pay the Charge out of his own Pocket. But if any thing is lost by an ^h unavoidable Accident, he is not liable. He cannot by any ⁱ Transaction or Arbitration give up any Right which belonged to the Minor. ^c D. 27. 9. 1. ^d 1 & 2. ^e I. 3. ^f 5 & 6. ^g eod. ^h C. 5. 51. 7. ⁱ D. 26. 7. 7. ^j D. 27. 3. pr. ^k C. 5. 27. 6. ^l C. 5. 38. 4. ^m D. 26. 7. 46.

The Minor has his Action against all the Guardians that acted if there were many, every one being answerable for the Act of each other, and for the Whole. And if he has not there a sufficient Recompence, then he must sue the ^k Security, and afterwards the inferior Magistrate himself, who was careless in taking insufficient Security. ^k D. 27. 3. 1. ^l 5.

But this Law is obsolete. Vinii com. lib. 1. tit. 24. § 4.

Last of all the ¹ Honorary Guardians who did not act, shall be liable to the Minor's Suit; for a ^m Duty is incumbent upon them to supervise those who undertook the sole Administration. ¹ D. 26. 7. 39. ^m D. 26. 7. 3. ⁿ 2.

As this is unreasonable, so it is not practised at this Day.

^a If the Guardian hath not a sufficient Stock in his Hands to maintain the Minor, but borrows Money or advances Money of his own, he shall be allowed Interest for it. ^a D. 27. 5. 3. 1.

A ^o Restitution shall be adjudged in the Behalf of the Minor, if he is circumvented, tho' the Tutors or Curators were present and consenting; and though the Decree was made against the Minor judicially; and this is called *Restitutio in integrum*. ^o C. 2. 25. 2.

In Scotland four Years only are granted after full Age to recover what a Minor did to his Prejudice during his Minority. Mackenzy's Institutes, page 45.

In England, ten, six, or four, or two Years are allow'd according to the Nature of the Action after full Age, to commence a Suit or Action, which was neglected during Minority. 21 Jac. c. 16.

The

The Guardianship is not only determin'd by *Excuse* or by the *Death* of the Minor or Guardian, or by *Puberty* in Respect of the Tutor, and by *full Age* in Respect of the Curator, but also he may be removed when ^p justly suspected of a fraudulent or unskilful Administration. If he be found guilty of Fraud, he is perpetually ^q removed and render'd infamous; neither shall it avail if he ^r offers good Security for his Fidelity for the future; for still he will be esteem'd to have a fraudulent Intention. The Guardian also, besides a *Removal* from his Office, is farther ^s punishable if he absconds to avoid the Decree of the *Prætor* for an Allocation to maintain the Minor; if he falsely pretends the Minor to be so ^t poor that there is not sufficient to maintain him, or if the Guardian bought his Office or redeem'd it with Money.

A Guardian also may be removed, as justly *suspected*, if he is ^u immoral in his Life and Conversation. But Poverty is not a Crime, or Cause of Suspicion, though in this Case it is ^w prudent to join another with him.

^x When the Guardianship is ended, he ought to pass a just Account, though appointed Guardian without Account by the Testament of the Father; for it is of publick Concern that Minors should be protected, and that Guardians should discharge themselves with Fidelity.

In France, if the Guardian obtains a Release from the Minor when he comes to full Age without giving a particular Account, the Release is void, for it looks like Contrivance and Deceit. Les Loix Civiles, 2 tom. h. t.

^y But the Guardian may pass an Account during the Minority of his Pupil if necessary, and he ought to be allow'd all necessary Expences for Reparations, ^z Costs of Suit, Voyages, Journies, ^a for a necessary Allowance to a poor Mother or Sister of the Minor; and for all these Expences he has ^b Security from the Minor's Estate, and a Privilege before other Creditors.

By the Canon Law, and in Germany and Holland, a Guardian ought to pass his Accounts every Year. Bokelmanni differentia Juris, &c. cap. 18.

The King of England cannot be a Minor. 1 Inst. 42. a. and he is the general Guardian to all Minors, Idiots, Lunatics, &c. in the Kingdom. 17 Ed. 2. c. 9. & 10. No one amongst us can be forced to be a Guardian, as in France, &c. Groenw. de LL. Abr. in Inst. lib. 2. tit. 25.

There are three Sorts of Guardianship, by the Common Law, by Statute, and by Custom. 1 Inst. 88. b. Where the three Kinds of Tutelage, according to the Civil Law, are allowed.

1. By Common Law there is a Guardian in Chivalry or Knight-Service taken away by 12 Car. 2. c. 24. A Guardian by Nature, as the Father or Mother. A Guardian in Socage, who is the next of Blood,

^x Inter edere & reddi Rationes multum interest; nec is qui edere jussus sit reliquum redde-
dere debet. D. 50. 16. 89. 2.

Blood, to whom the Inheritance cannot descend, which continues till the Heir accomplish fourteen Years. A Guardian because of Nurture, when the Father by his Last Will and Testament appoints a Friend to be Guardian of the Body of his Child, and in Default of such Appointment by Will, when the Ordinary appoints such a Guardian till the Minor is fourteen Years of Age. And so a Guardian is given by the Ordinary where an Infant is entitled to be Executor or Administrator. In the first Case till seventeen Years of Age, in the latter till twenty one.

2. By Statute Law, where by the 4 & 5 Phil. & Mar. in Relation to the taking away of Women Children under sixteen Years of Age, or marrying them without Consent of Father or Mother; the Father or Mother, or any other by Assignment of the Father by Act in his Life-time, or by his Last Will, are said to have the Custody of such Woman Child for that Purpose. But it is enacted more fully by 12 Car. 2. c. 24. That it shall be lawful for the Father of a Child unmarried, and under one and twenty Years of Age (whether born or posthumous, or whether the Father be one and twenty Years of Age or not) by Deed in his Life-time, or by his Last Will in writing in the Presence of two or more Witnesses, to dispose of the Custody or Tuition of such Child till full Age, or for a lesser Time; and such Disposition shall be good against all Guardians in Socage or otherwise; who may manage the Lands and personal Estate for the Use of the Child till his full Age of one and twenty Years.

3. By particular Custom the Tuition and Custody of Orphans, Children of Citizens and Freemen, is committed to the Mayor and Aldermen of the City of London, and of other Cities and Boroughs; which Customs are saved by the Statute Laws. 1 Inst. 88. b.

VII. The ^c Prince is he to whom by Law the supreme Power is committed. His personal Prerogatives are called the *Regalia*, and they are either of *Favour* or *Justice*.

Those of *Favour* ought to be interpreted most ^d beneficially for the Receiver, for Liberality is natural to Princes; such is the Power of ^e Legitimation, ^f Denization, the Power of making ^g Communities and Colleges.

In England a Subject may incorporate an Hospital by the King's Licence. 39 Eliz. c. 5.

Those of *Justice* are his Power over ^h Weights and Measures, the ⁱ Power of coining Money, ^k creating inferiour Magistrates, ^l the Power of making Laws since the People conferr'd that Authority upon him, ^m from which he himself is exempt, i. e. is not punishable by them, though it is fit that he should live according to their Direction.

In England the Legislative Power is in the King, Lords, and Commons. Our Prince cannot be under the coercive Power of the Law,

^a Princeps bona concedendo videtur Obligationes concedere. D. 50. 16. 21.
Beneficium Imperatoris, quod à Divina scilicet ejus indulgentia proficiscitur, quàm plenissimè interpretari debemus. D. 1. 4. 3.
Princeps beneficii sui est æstimator. D. 50. 17. 191.

Of a Person as Prince or Subject.
^c D. 48. 22.
^d 19. & 1. 4.
^e D. 1. 4. 3.
^f D. 40. 11. 2.
^g N. 78. 5.
^h D. 3. 4. 1.

^h C. 10. 70. 9.
ⁱ C. 9. 24. 2.
^k D. 48. 14. 1.
^l D. 1. 4. 1.
^m D. 32. 1. 23.
Nov. 105. 2. 4.

Law, because all Process issues in his own Name; and for that Reason, even in Matters of Civil Right, if any Person hath a just Demand upon the Prince, he cannot recover it by Action against him, but is put to his Petition of Right to the Prince in his Courts of Justice.

A Subject is he that is under the Power and Protection of a Prince. And is either so by ^a Birth, ^o which Relation he can never put off, no not by swearing Allegiance to another Prince; or by reason of ^p Residency under such a Prince, which is temporary only, and ceases when he leaves that Prince's Territories.

Amongst the Subjects, inferior Magistrates are to be reckon'd; ^p some whereof have Jurisdiction to imprison, to inflict capital Punishments; and ^q every Magistrate hath some coercive Power of course, if he hath a Jurisdiction. ^r Where the Authority is equal, one Magistrate hath no Power over the other: But if a Magistrate leaves his own Jurisdiction, and comes into the Jurisdiction of another, who is his Equal, or Inferior, yet he is ^s subject to that Jurisdiction.

In the Election or Creation of Magistrates it ought to be a Rule, that no one be suffered to administer an Office in the common-wealth before he is ^t twenty five Years of Age; ^u yet the beginning of the last Year may be esteemed as complete. ^v And then Men ought to rise to Magistracy by degrees, and not to the greatest first. ^x But if Money is offered for an Office, such an one ought to be rejected. What if several Acts are done by one in the Place of a Magistrate who was not really a Magistrate, because not qualify'd for it, are his Acts valid? In Strictness they are not valid, ^y but for the Peace of the Publick they ought to be supported.

He that is not a Magistrate may be termed a Plebeian, ^z for all Citizens (except the Patricians and Senators) may be comprehend- ed under that Denomination.

VIII. Corporations, Communities or Colleges are ^a Civil Persons, and have their Civil Capacities as one Body. They cannot be erect- ed without the Permission of the Prince. They may be established on the Account of ^b Religion, as Monasteries; or of ^c Policy for good Government in Cities, as the Companies or Colleges of Tradesmen; who may possess Estates and divers Privileges. ^d Where the major Part of any Body does act, it is understood to be the Act of every particular Member, ^e but the Major Part must consist of two Parts in three.

This is not always observed, for the Act of the major Part simply and absolutely is to be esteemed the Act of the whole Body. Groenw. de Legibus Abrog. in Cod. lib. 10. tit. 31. l. 45. v. the English Act, 33 H. 8. c. 27.

Therefore

^a Cui Jurisdictio data est, ea quoque concessa esse videntur, sine quibus Jurisdictio explicari non potuit. D. 2. 1. 2. Non est singulis concedendum quod per Magistratum publice fieri possit, ne occasio sit majoris tumultus faciendi. D. 50. 17. 176. Cui præcipua cura rerum incumbit, & qui magis quam cæteri diligentiam & sollicitudinem rebus, quibus præsumt, debent, Magistri appellantur. D. 50. 16. 57.

^z Plebs est cæteri cives sine Senatoribus. D. 50. 16. 238.

^d Refertur ad Universos quod publice fit per majorem partem. D. 50. 17. 160. 1.

^e Tres faciunt Collegium. D. 50. 16. 85.

Therefore ^f three in Number are requisite to make a Corporation; ^d D. 50. 16. 85. and then the Power of the whole Body may be delegated to one Person to act for them, who is sometimes called a ^g Syndick. He ^d D. 3. 4. 1. 1. that is nominated to any thing ^h may vote for himself; for the Vote ^k 2. of a single Person is not so much consider'd, as that it is a Corporation or Community Act. ⁱ But where the whole Power is in one ^d D. 3. 4. 4. Person, he cannot elect himself, as the *Prætor* cannot appoint himself to be a Guardian; nor a Patron present himself to a Benefice. ^d D. 26. 5. 4.

A Corporation may have a ^k common Chest, and sometimes a common *Seal*. ⁱ They may bring Actions in their own Name, and Actions ^d D. 3. 4. 1. 1. may be brought against them. ^m They may borrow Money by their ^d D. 3. 4. 7. Syndick; but if he borrows more than he had Authority for, the Community is not answerable for it, unless the Money came to their Use. The Money does not belong to the particular Persons of that Community, but it belongs to the ⁿ whole Body; as the Debts of the ^d D. 12. 1. 27. whole Body are not chargeable on the particular Persons of it. ^d D. 3. 4. 7. 1.

• Altho' a Community or Corporation cannot be constituted in ^o D. 3. 4. 7. 2. one Person at the first, yet if the Community is reduced to one Person, it still may subsist as a Corporation.

The Laws and Customs of a Corporation are called *Statutes*.

In England, *By-Laws*.

A Corporation cannot as such commit Offences and Crimes; for it is a Person in *Notion*, and by Fiction only. Therefore the ^p De. ^d D. 4. 3. 15. *linguents* in the Corporation ought to be punished, but not that ^q D. 43. 24. 15. which is *incorporeal* and merely a *Right*. ^{2.}

So the Divine Law, Judg. vii. 8 & 14 & seqq. Tho' by the Divine Law too, Cities were to be destroy'd for Idolatry. Deut. xiii. 5. 12. & seqq. and Cities are supposed by the Civil Law to be plowed up, as D. 7. 4. 21.

In Cities, &c. there may be many Infants, decrepit Persons, Women and many innocent Men, who did not concur in the Crime; and therefore ought not to suffer in the Loss of their Rights and Privileges, which they were intitled to. But the contrary is often practised. v. 2. W. & M. Sess. 1. c. 9.

By the Laws of England every Body Politick or Corporate (be it Ecclesiastical or Lay) may subsist three Ways, viz. By Prescription, By Letters Patents of the King, By Act of Parliament. 1 Inst. 250. a.

Also a Corporation may be in one Person, as a Bishop, Parson, Prebend, &c. Our Law dividing a Corporation into Sole and Aggregate.

BOOK II.

Of THINGS or RIGHTS.

CHAP. I.

Of Things or Rights, as they are either in the Patrimony or Property of single Persons, or out of their Patrimony or Property. And therein, of Things common, publick; of Things which belong to a particular Community; and of Things which belong to no single Person or Number of Men.

^aD. 50. 16. 23. **T**HUS far of a Person in his *Natural* and *Civil* Capacity. I shall now shew the Nature of ^a*Things or Rights*, the *second* Object of the *Civil* Law; not but that the *first* and *third* Object will properly come under that Denomination; but here *Things* are to be taken strictly for all that which is distinct from *Persons* and *Actions*.

Things ought to have three Qualities annex'd to them.

- ^r D. 50. 17. 186. 1. That they do *exist*, or that they *may* exist; ^r for nothing ought to be demanded before such Time as it *may* be paid; tho' a Thing may be due that exists only in *Futurity*. For not only *growing* Profits may be bought, but ^s *Hope* itself, as the next Cast for Fish or Birds, may be bargain'd for. The Law does not support Things past and impossible; therefore if a Man promises the Money in
- ^s D. 18. 1. 8. 1. his Chest, ^t which was lost without the Fault or Knowledge of the Person making the Promise, there is nothing due. And if a House
- ^t D. 45. 1. 37. ^u already burnt is purchased, nothing is sold or passeth in the Bargain; yet though the *Parts* of a Thing are *changed* it does exist in
- ^u D. 18. 1. 57. Law, and seems to be the same; as an ^w Army is the same, though many Persons come into the Room of others removed; and a Ship is still the same, though by frequent Reparations none of the first Materials are remaining.
- ^w D. 5. 1. 76. 2. Things ought to be *certain*, and capable of being an Object of the Senses or Understanding. Thus if it does not appear in a ^x Promise, what, what Sort, how much is promised, it can take no Effect by Reason of the Incertainty.

3. *Things*

^a Rei appellatione & Causæ & Jura continentur. D. 50. 16. 23.

^r Nihil peti potest ante id Tempus quo per Rerum Naturam persolvi possit. D. 50. 17. 186.

3. y Things ought to have some *Value* or *Use*, either from *Necessity*, *Profit*, or *Pleasure*. What is to no *Purpose*, or very *mean*, ought not to be regarded. So if a ^a Debtor gives in Legacy to his Creditor the Debt which is due to him, the Legacy is void. And if a Man sues for a petty trifling Sum laid out in Reparations, his Demand ^a sometimes ought not to be countenanced. ^{D. 34. 3. 25.} ^{D. 25. 1. 12.}

But in directing you more particularly to the Knowledge of this second Object of the Law, I shall shew, *First*, The Division of Things as they appertain to the Patrimony or Property of single Persons, and as they are *out* of their Patrimony or Property. *Secondly*, The Division of Things as they are corporeal and incorporeal. *Thirdly*, I will set down the several Ways of acquiring by the Law of Nations. And, *Fourthly*, the Method of acquiring by the Civil Law.

I. Since a Community of Goods is impracticable, in as much as some Men are naturally more ambitious than others, and all Men would not be equally industrious to the raising of the common Stock, we must suppose distinct Property. And therefore we say those Things are in our Patrimony which any way may belong to private Persons, whether corporeal or incorporeal, and ^b for the Recovery of which there is an *Action*, or *Exception* for the Defence of the Possession. For the Word *Patrimony* here is taken *generally*, and not in its strict and proper Sense, when it signifies that Estate only which was derived *à Patre*. ^{Of Things in Patrimony or Property.} ^{D. 41. 1. 52.}

Of Things that are in our Patrimony, we are said to have ^c *Dominium*, which also largely taken is a *Right of disposing or claiming any thing corporeal or incorporeal, unless the Law or our own Agreement does hinder it*. This *Dominium* is either *Directum*, where one has the *Propriety* only without the Profit; or *Utile*, where one has the Profit only without the Propriety, and pays some Acknowledgment for it. But when the Propriety and Profit are vested in the same Person, he has *Plenum Dominium*, or as the Feudists call it *Allodium*, which is not subject to any Condition or Charge. He that has *Plenum Dominium* does *possess*, and is in *Possession*, ^d for one may be without the other, seeing ^d to *possess* signifies the *Right*, and to be *in Possession* signifies to be so in *Fact* only without a *Right*. *Corporeal* Things may be possessed according to their different Natures, as a House by lying in it, or by keeping the Keys of it; Cattle by being shut up, or by being guarded in the Fields; Land by manuring it, &c. *Incorporeal* Things, as an Office, a Right of Toll, &c. by the Use and Exercise of it. ^{D. 41. 2. 10.}

No Possession can be acquired ^e without an *Intention* to possess, ^e and an actual *Seizure* or *Entry* into Part at least in the Name of the Whole; but a Possession may be *retained* by an ^f *Intention* only to retain it; for no one is obliged to be constantly present with it. ^f And it may be ^g *lost* by a bare Declaration of the Mind to have it so, although the Possession is afterwards actually continued. ^g ^{D. 41. 2. 3.} ^{D. 41. 2. 3.} ^{6. & 8.}

Otherwise by the Law of England.

N n

Two

¹ Videtur Res ei abesse, cui pretium abest. D. 50. 16. 14. Proprie Bona dici non possunt, quæ plus incommodi quam commodi habent. D. 50. 16. 83.

^c Dominium, est Jus quo libere de re statuere, eamque vindicare possumus.

^d Interdum proprietatem verbum possessionis significat. D. 50. 16. 78.

^h D. 41. 2. 3.
4 & 5.

^h Two or more Persons cannot wholly possess the *same* Thing at the same Time with the same Kind of Possession; but with a *different* Kind of Possession they may do it. The one may possess it *Civiliter*, the other *Naturaliter*, that is, as before mention'd, one may have the *Right* only, the other keep the *Possession*.

ⁱ C. 4. 27. 1.

A Possession may be gained by ⁱ *Proxy* as well as by our own Presence.

^k I. 4. 15. 5.

A Possession may be ^k *continued* by Tenants, Servants, by those to whom the Thing is *lent*, or with whom the Thing is *deposited*; for these may possess in the Owner's Name.

^l I. 4. 15. 4.

It is very advantageous to be in Possession, though you have no Title, therefore there is frequently a great Contest for this Advantage. For the Proof lies upon the Person that would come in upon the Possessor; wherein if he fails, ^l the Possession continues till the true Title does appear; and if the Proof seems dubious, the Presumption of Right shall be for the Person in Possession. Besides there is this farther Advantage that the Person in Possession may defend himself with the mean Profits of the Estate.

That your Notion of Possession may be distinct, remember that all Possession is either by the *Proprietor* himself, or by *others* with his Consent, as in lending, letting to Hire; or by others *against* his Consent, as by Thieves, Intruders, &c.

Maxims and Rules concerning Property and Possession for Memory sake.

^m D. 50. 17.

^m He that has a good Action for the Recovery of his Right, is supposed to be in Possession of it; ⁿ though it is better to be really and in actual Possession.

ⁿ D. 50. 17.

^o D. 50. 17.

^p D. 50. 17.

^q I. 2. 20. 10.

^r D. 50. 16.

^s D. 50. 17.

^t D. 50. 17.

^u D. 50. 17.

^v D. 50. 17.

^w D. 50. 17.

^x D. 50. 17.

^y D. 50. 17.

^z D. 50. 17.

^{aa} D. 50. 17.

^{ab} D. 50. 17.

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^{ba} D. 50. 17.

^{bb} D. 50. 17.

^{bc} D. 50. 17.

^m Is qui Actionem habet ad rem recuperandam ipsam Rem habere videtur. D. 50. 17. 15. Meorum & Tuorum appellatione Actiones continentur. D. 50. 16. 91. Bonis annumerabitur si quid est in Actionibus. D. 50. 16. 49.

ⁿ Sed minus est Actionem habere quam Rem. D. 50. 17. 203.

^o Non videtur perfecte cuiusque id esse, quod ex causa auferri potest. D. 50. 17. 139. 4. Dolo facit qui petit quod redditurus est. D. 50. 17. 173. 1. Quod evincitur in bonis non est. D. 50. 17. 190.

^p Id quod nostrum est sine facto nostro ad alium transferri non potest. D. 50. 17. 11.

^q Quod proprium est alicujus, amplius ejus fieri non potest. L. 2. 20. 10. Neque pignus, neque depositum, neque precarium, neque emptio, neque locatio rei suae consilire potest. D. 50. 17. 45. Non ut ex pluribus causis deberi nobis idem potest, ita ex pluribus causis idem possit nostrum esse. D. 50. 17. 159.

^r Recte dicimus eum fundum totum nostrum esse etiam cum usufructus alienus est, quia Ususfructus non est Domini pars. D. 50. 16. 25.

^s Invito Beneficium non datur. D. 50. 17. 69. Quod cuique praestatur, invito non tribuitur. D. 50. 17. 156.

^t Quoties utriusque causa lucris Ratio vertitur, is praesferendus est, cujus in lucrum causa Tempore praecedat. D. 50. 17. 98. Qui prior est Tempore potior est in Jure. 54. de Reg. Jur. in 6.

- ^u No one can pass over a greater Right than he has in himself. D. 50. 17.
- ^w Every one has Liberty to renounce his own Right. 54.
- ^x No one seems to have an ill Design against another, while he acts only in Pursuance of his own right. C. 2. 3. 29. D. 50. 17.
- ^y No one is to be forced to defend his Right. 55. D. 50. 17.
- ^z Two Persons cannot have the whole Property or Possession of the same Thing. 156. D. 13. 6. 5. 15.
- ^a Sometimes those Things that are made over to another may be recalled, as if he had no Power to alienate them. As when a Title ceases by the Performance of a Condition. D. 50. 17. 205.
- ^b He that is spoiled of his Possession must be restored to it, before the Title of any other can be examin'd. C. 9. 12. 7.
- ^c He that has Possession has the Advantage D. 50. 17. 128.
- ^d He does not alienate his Right, who neglects to take Possession of it. D. 50. 17. 119.
- ^e He that may alienate whether you will or no, may much more alienate in your Absence, and without consulting you. D. 50. 17. 26.
- ^f They do not seem to have lost a Thing, which did never belong to them. D. 50. 17. 83.
- ^g Possession taken honestly and without any ill Design, is as effectual as a good Title to some Purposes. D. 50. 17. 136.
- ^h No one can have a Title by the Fraud of another that acts for him. D. 50. 17. 49.
- ⁱ He that comes into Possession by the Decree of the Judge, is the lawful Possessor till the Decree is reversed. D. 50. 17. 137.

No

- ^a *Nemo plus juris ad alium transferre potest quam ipse habet.* D. 50. 17. 54. *Qui in Jus Dominiumve alterius succedit Jure ejus uti debet.* D. 50. 17. 177. *Nemo plus commodi Heredi suo relinquit quam ipse habuit.* D. 50. 17. 120. *Absurdum est plus juris habere eum cui legatus est fundus quam Heredem aut ipsum Testatorem, si vivet.* D. 50. 17. 160. 2. *Non debeo melioris conditionis esse quam Auctor meus à quo Jus in me transit.* D. 50. 17. 175. 1.
- ^b *Omnes licentiam habent his quæ pro se introducta sunt renuntiare.* C. 2. 3. 29. *Unicuique licet contemnere ea quæ pro se introducta sunt.* D. 4. 4. 41.
- ^c *Nullus videtur Dolo facere qui suo jure utitur.* D. 50. 17. 55. *Nemo damnum facit nisi qui id facit, qui facere jus non habet.* D. 50. 17. 151. *Non videtur vim facere qui jure suo utitur.* D. 50. 17. 155. 1. *Nil dolo Creditor facit qui suum recipit.* D. 50. 17. 129. *Damnum suum reficere unicuique licet dum non officiat invito alteri in quo Jus non habet.* D. 50. 17. 61.
- ^d *Invitus nemo Rem cogitur defendere.* D. 50. 17. 38.
- ^e *Duorum in solidum Dominium vel possessio esse non potest.* D. 13. 6. 5. 15. *Uni duo pro solido Heredes esse non possunt.* D. 50. 17. 141. 1.
- ^f *Plerumque fit ut etiam ea quæ à nobis abire possint, perinde in eo statu sint atque si non essent ejus Conditionis ut abire possint.* D. 50. 17. 205.
- ^g *Ante omnia Violentiæ causam examinari præcipimus.* C. 9. 12. 7.
- ^h *In pari causa Possessor potior haberi debet.* D. 50. 17. 128. *Cum de Lucro duorum queratur, melior est causa Possidentis.* D. 50. 17. 126. 2. *Cum par delictum est duorum, semper oneratur petitor & melior habetur possessoris causa.* D. 50. 17. 154.
- ⁱ *Non alienat qui duntaxat omittit possessionem.* D. 50. 17. 119.
- ^j *Qui potest invitis alienare, multo magis & ignorantibus & absentibus potest.* D. 50. 17. 26.
- ^k *Non videntur Rem amittere, quibus propria non fuit.* D. 50. 17. 83. *Non potest videri desisse habere, qui nunquam habuit.* D. 50. 17. 208.
- ^l *Bona fides tantundem possidenti præstat quantum veritas, quoties Lex impedimento non est.* D. 50. 17. 136.
- ^m *Alterius Circumventio alii non præbet Actionem.* D. 50. 17. 49.
- ⁿ *Qui Authore Judice comparavit, bonæ fidei possessor est.* D. 50. 17. 137.

^k D. 50. 17. 176. ^k No private Man may take Possession of his own by Force, where a Remedy may be had by Law.

^l D. 50. 17. 165. ^l He that may alienate may consent to the Alienation, where there is the same Reason for the one as well as the other.

^m D. 50. 17. 121. ^m He that has fraudulently quitted his Possession shall be supposed to be in Possession to answer all Damages, but not to make Advantage by it.

ⁿ D. 50. 17. 177. 1. ⁿ He who is persuaded that he has a Right, may be guilty of a Mistake, but not of a Deceit.

^o D. 50. 17. 173. ^o By a Law to *restore*, the mean Profits are to be restored as well as the Principal, though no particular Mention is made of them. But to *exhibit* any thing, signifies no more than to produce it.

^p D. 50. 17. 148. ^p Those that are to have the Benefit of the Whole, must have the Benefit of every Part.

^q D. 50. 17. 140. ^q He that is absent in the Business of the Commonwealth, as he must not lose his Right by Reason of his Absence, so his Absence must not be advantageous to him to the Prejudice of another.

Of Things out of Patrimony or Property. II. Thus of Things that we may possess, and that are in the *Property* of single Persons. Those Things that are *out* of our Patrimony, and cannot be possessed by single Persons, are Things *common*, *publick*, of a particular *Community*, and Things that belong to *no Person* or Number of Men.

^r I. 2. 1. 3. & 4. ⁱ *Res Communes* are those in which no Person has a Property, neither can any one be Master of them, or deprive others of the Use of them. For by their Situation the Use is *common* to all, both Man and Beast; as the Heavens, Stars, the Sea, Air, any running Water, and the Sea-shore, which is all that Ground which the Winter Tides can cover. But the dry Lands which keep the Sea within its Bounds, belong to the People of that Countrey where they lie. Hence it is lawful for every one to fish in the Sea, to make use of the common Air, to draw or drink any constant running Water, to make use of the Sea-shore to dry Nets, or to build Huts or Cottages upon *it*; which being built, belong to particular Persons by Occupancy, and ought not to be invaded by others. In this particular Case the Ground follows the Building.

Thus the Venetians pretend to be independent of the Empire, and a free State, acknowledging no Superior, because their City is built in

^k *Non est singulis concedendum quod per Magistratum publice fieri possit, ne occasio sit majoris tumultus faciendi.* D. 50. 17. 176.

^l *Cum quis alienare, poterit & consentire alienationi.* D. 50. 17. 165.

^m *Qui dolo desit possidere, pro possidente damnatur, quia pro possessione Dolus est.* D. 50. 17. 121. *Semper qui dolo facit quo minus haberet, pro eo habendus est ac si haberet.* D. 50. 17. 157. 1. *Nemo ex suo delicto meliorem suam conditionem facere potest.* D. 50. 17. 134. 1. *Paremi esse oportet conditionem ejus qui quid possidet vel habeat, atque ejus cujus dolo malo factum sit quo minus possideat vel haberet.* D. 50. 17. 150.

ⁿ *Nemo videtur dolo exequi qui ignorat causam cur non debeat petere.* D. 50. 17. 177. 1.

^o *Restituit quod habiturus esset Actor, si Controversia ei facta non esset.* D. 50. 16. 75.

Cum verbum Restituas in Lege invenitur, etsi non specialiter de fructibus additum est, tamen etiam fructus sunt restituendi. D. 50. 17. 173. D. 50. 16. 246. 1. *Plus est in Restitutione quam in Exhibitione.* D. 50. 16. 22.

^p *Cujus effectus omnibus prodest, ejus & partes ad omnes pertinent.* D. 50. 17. 148.

^q *Absentia ejus qui Reipub. causa abest neque ei neque alii damnoosa esse debet.* D. 50. 17. 140.

Officium publicum nulli nec damno nec compendio sit. D. 4. 60. 29.

^r *Littus est quousque maximus fluctus à mari pervenit.* D. 50. 16. 96. & 112.

in the Sea, and upon a Soil that had no Proprietor. But now by immemorial Custom, long Possession and by Leagues and Treaties, several Parts of the Sea cease to be Common, and have particular Proprietors. The Dane claims the Dominion of the Baltick; the King of Great Britain the Four Seas which lie round his Island; the Venetian the Adriatick, &c. V. Selden Mare clausum.

2. *Res Publicæ* are those Things which belong to some certain People, or to those to whom the *Regalia* appertain; but the Use of them ought to be common to all Men, at least of that Nation; as the *Publick Money, High-ways, Ports, and Rivers.*

Such Rivers as the Danube, Rhine, Thames, &c.

And therefore the Right of sailing and fishing is publick in such Rivers and Ports, as also the Use of the Banks of Rivers to unlade Burthens on them; to tie Cables and Ropes to the Trees growing on them, though the Banks themselves, and the Trees belong to those to whose Estate they are joined.

By the Law of England the Property of all publick Things is vested in the King, or in those that claim under him; for many private Persons are in Possession of them, others having a Right to use them: In other Nations Publick Things are in those that have the Supreme Power. Perez. Præl. c. De Alluvione in fin.

" It is not lawful to erect Mills or other Buildings on the Rivers" D. 48. 8. 61. without a particular Licence.

The ancient Estate and Domains of a Crown, and those Things newly annexed or daily arising to the Exchequer, are also Things publick. For Commonwealths are to be supported as private Families, and must take Account of Receipts and Disbursements, and manage its Stock with Care and Frugality, if they intend to Subsist with Character and Reputation.

Ærarium formerly contain'd the publick Money of the People, and *Fiscus* the proper Money of the Prince; but the Distinction began to cease as Monarchy prevailed in Rome; and now *Fiscus* only contains the publick Money, and is different from the *Patrimoniales* of the Emperor or Empress, or from the privy Purse, yet all have the same Privileges, viz. of Preference in their Debts; of having a Pledge in the whole Estate of their Officers from the Time that they begin to manage their Revenues; of beginning their Claim by Execution, or by seizing of the Estates of those that are indebted to them.

The ancient Lands and Estate of a Crown may be let out to Hire, but not alienated. The Rents may arise from Mines, Fishing, Saltpits, Customs. But the Exchequer itself is free from all Payments of Custom or Taxes; and all those who export their Effects upon publick Affairs (as for the Armies, &c) are free from Custom.

O o

Things

* Portus est locus conclusus quo importantur merces. Et in id exportantur. D. 59. 16. 60.

^g D. 39. 4. 8. Things *newly* annexed or daily arising to the Exchequer, are
^h F. 2. 56. ^g Forfeitures, ^h Fines, ⁱ Escheats, &c. after the Creditors are paid
ⁱ C. 10. 10. 5. their just Debts; ^k for that which remains after Debts paid are only
^k D. 49. 14. the *Goods* of any Man. These may be alienated by the Prince as
 11. his own *private* Money, which he hath by Succession, Legacy, Gift,
 &c. for they were never annexed to the Crown; and if they could
 not be alienated, in process of Time most of the private Estates of
 the whole Nation would be swallowed up in the publick Exche-
 quer.

Yet see the Case of the Duchy of Lancaster, Plowden, &c. And
 1 Annæ c. 7.

^l I. 2. 1. 6. 3. ^l *Res Universitatis* are those Things where the Propriety belongs
 to a particular Community, but the Use of them is free to all Per-
 sons of that Body or Community; as the Streets, Theatres, the Place
 for Races, Market-places, the Courts of Justice, the Common for
 Cattel, &c.

Vid. ante, of *Corporations*.

But the Stock of Money or Patrimony belonging to any City or
 Society is not to be used by every single Person; but is to be dis-
 posed of by the whole Body, and is to be acquired by those Ways,
^m D. 18. 1. 6. as Dominion and Possession is gained by ^m private Persons.

ⁿ I. 2. 1. 7. 4. ⁿ *Res nullius* (or Things which are not the Goods of any Person
 or Number of Men) are those that are of a ^o *Divine* Right; for
 Derelicts, wild Beasts, Birds, Fishes and Pearl found in the Sea, or
 Treasure found in the Ground, *Hereditas jacens*, or an Inheritance
 lying before it be enter'd on or appropriated, are not to be reckoned
 under this Head, being of a *private* Nature, and *capable* of a Pro-
 prietor. Things therefore of a *Divine* Right are those that are
 exempted from the promiscuous Use of Men, and are in a Manner
 the Property of God only; of which there are three Sorts, *Res Sacrae*,
Res Religiosae, *Res Sanctae*.

^p Nov. 131. *Res Sacrae*, Things sacred, which were duly and publicly *conse-*
^{c. 8. D. 1. 8.} *crated* to God by the ^p Priests; as *Churches* and their *Ornaments*,
^{9. 1.} *Chalices*, *Books*, &c.

^q C. 1. 2. 21. These are forbidden to be *alienated* or pawned, unless for the Re-
 demption of Captives (for Man is of greater Value than inanimate
 Things) unless also for the Relief of the *Poor* in Time of great *Fa-*
^{cum auth.} *mine* and *Want*, or for paying the *Debts* of the Church, if a Supply
^{seqq. & Nov. 7.} cannot be raised otherwise, or upon other Cases of ^q *Necessity* or
 great Advantage to the *Church* itself. In every Alienation the
Cause must be first examined, and the Decree of the Prelate inter-
 vene, with the Consent of the whole Clergy or Chapter.

If

^k *Id enim bonorum cujusque intelligitur quod æri alieno superest.* D. 49. 14. 11. D. 50.
 16. 39. 1.

ⁿ *Quod nullius esse potest, id ut alicujus fieret, nulla Obligatio valet efficere.* D. 50. 17. 182.
Quod Divini juris id nullius in bonis est. I. 2. 1. 7.

If the Alienation is made without these Solemnities, by the ^c Canon Law the Punishment is Excommunication, as against a sacrilegious Person; but by the ^c Civil Law the Church shall claim the Things alienated without paying back the Money which was the Price or Consideration; and the Buyer must take his Remedy against the Person that alienated them. By the Laws of England, the Goods belonging to a Church may be alienated by the Consent of the Ordinary, Patron, and Parson, &c.

If a Church once consecrated to God falls or is pulled down, yet the Place and ^c Ground remains sacred, and cannot be sold or applied to profane Uses. ^c D. 18. 2. 73.

There is an Example of the Dedication of a Temple in the ^c King viii. By the Laws of England, Churches and Churchyards are in the Property of the Parson, Finch's Law 131. 1 Inst. 341. a & b. and the Ornaments of Churches are in the Churchwardens for the Use of the Parishioners. Degg's Parson's Couns. c. 12.

Res Religiosæ, or Religious Things, are those Places into which the Body, or principal Part of the Body, as the Head, Bones or Ashes of a dead Man, are brought to be perpetually buried there by him that has a Right to bury in that Place. ^c D. 11. 7. 3. ^c D. 11. 7. 41 & 44.

Every private Person may make a religious Place of his own Authority, provided he has the whole Right of the Ground in himself, or Leave from the lawful Owner. ^c For if he has not *plenum Dominium*, or the Consent of all Parties interested, he cannot do it; neither if the Ground is in Partnership can a dead Body be buried there without the Consent of his Partner, ^c unless it be the Body of the Partner himself. The Ground ^c Adjacent to the Grave is not to be accounted religious, but may be used and manured. As a Place is made religious by burying the dead Body, ^c so by taking the Body away it ceases to be religious. But it ought not to be removed without the ^c Decree of the Priest or Command of the Prince. ^c D. 11. 7. 2. 1. & 3. ^c D. 11. 7. 41. ^c D. 11. 7. 2. 5. ^c D. 11. 7. 44. ^c D. 11. 7. 8.

It is observable that by the Law of the twelve Tables,

Cic. lib. 2. de legibus.

and by other ^b Laws afterwards, it was forbidden to bury dead Bodies within the City; therefore the Ancients had their private Sepulchres in the Fields. ^b D. 47. 12. ^b 3. 5.

But at this Day Churchyards are provided, and the Churches themselves for Burying-places; and by the ^c Canon Law no Ground is to be counted Religious unless it be made so by the Consecration of the Priest. ^c c. Ad hæc de religiof. Domibus.

He that lays a dead Body in the Ground of another Person without his Consent, will be ^d forced either to take away the Body, or pay the Value of the Ground so appropriated to a religious Use. And if any Man is hindred from bringing the dead Body into his ^c own Ground, he has likewise his Action; for dead Bodies ought not to be hindred from Burial, or stopt upon any Account, no not for ^c Debt,

^f N. 116. c. 4. ^f Debt, as vulgarly supposed, which seemed to be allowed by the Laws of the twelve Tables.

Gel. lib. 2. c. 1.

^g D. 11. 7. 12. 2. Such religious Acts are so far favoured, that ^g funeral Charges, tho' expended by a Stranger, shall be allowed out of the Estate of the deceased, ^h before all other Debts. And this favourable Allowance is wont to be extended to the Debts contracted by reason of his last Sickness, viz. to the ⁱ Debts due to Physicians, Apothecaries and Nurses. Also such a decent Respect and Reverence was always paid to these Solemnities of a Funeral that it was not accounted lawful to sue or serve any ^k Citation upon the *Kindred* or familiar *Friends* of the deceased Person within ten Days after his Decease.

^k Nov. 116. c. 5.

But the Law of England makes no such Allowance for the Debts contracted while the Person was alive; nor does it treat the Kindred of the Deceased with so much Tendernefs; and indeed Religious Places for burying, are either in the Property of the Parson of the Parish, or Churchwardens, or may belong to some other particular Proprietors, and are scarce distinguished from Things sacred. Degg. P. C. c. 12.

In Holland sacred and religious Places are not distinguished from Places of common Use, for their Temples and Sepulchres are not consecrated, and either belong to the Community, or the Person that built them. Groenw. h. t.

ⁱ D. 1. 8. 8. *Sanctæ res* are improperly said to be of a *Divine Right*; for the Word *Sanctum* is here to be taken in a restrained Sense, and not to signify every thing that is holy. *Martian* describes it to be ^l *that which is defended and guarded from the Injury of Men.*

^m D. 50. 7. 17. So ^m *Embassadors* are by the Law of Nations accounted *Sancti*; for there is an absolute Necessity of protecting them, because every thing cannot be transacted by Letters.

Vid. *Amongst the English Statutes, An Act for preserving the Privileges of Ambassadors and other publick Ministers of foreign Princes and States. 7 Annæ c. 12.*

But if Ambassadors do subject themselves to foreign Princes by the Commission of great Crimes within their Territories, it is strongly argued that they ought to be tried by the Law of that Prince; though others more judiciously urge, that they ought to be sent home and punished by their own Laws. V. post of Treason.

ⁿ D. 1. 8. 9. 3. *Ulpian* more properly defines *Sanctum* to be ⁿ *that which is neither sacred nor prophane, but confirmed and established with a Penalty or Sanction.* Thus Laws have their *Sanction* or Penalty against the Infringers of them; and the Walls and Gates of the *Roman City* were not

^g *Funus eum facere oportet quem decedens elegit. D. 11. 7. 12. 4. Impensa funeris semper ex hæreditate deducitur quæ omne creditum solet præcedere. D. 11. 7. 45.*

ⁿ *Sancta dicimus quæ neque sacra neque profana sunt, sed sanctione quadam confirmata. Ut Leges Sanctæ sunt, sanctione enim quadam sunt subnixæ. D. 1. 8. 9. 3. Sanctio legis est, quæ novissime certam pœnam irrogat iis qui præceptis Legis non obtemperaverint. D. 48. 19. 41.*

not to be *violated*, for it was ° Death to damnify them, to break ° D. 1. 8. 11. them down, to go over or scale them.

On this Account Romulus killed his Brother Remus at the first building of Rome for leaping over the Wall; taking this Opportunity to be rid of his Rival.

And I doubt not but (in Time of War especially) the pulling down any Part of the Wall of a City, or the scaling it, may be punishable at this Day.

C H A P. II.

Of Things Corporeal and Incorporeal; and therein of Predial and Personal Services.

THE second Division of Things is, that they are either P Corporeal or Incorporeal. P I. 2. 2.

Corporeal are those that are *moveable*, as Silver, Gold, Household Goods, Cattle, Trees cut down, Fruit gathered, &c. or *immoveable*, as Land, Mines, Houses, and the several fix'd Parts of them, Trees, Corn and Fruit not yet gathered, &c. These may be touched and handled, and are subject to the Senses. *Incorporeal* are such as cannot be handled or seen, but exist only in the Mind, as *Services*, the *Right of Inheritance*, *Obligations*, *Actions*, *Customs*, *Prescriptions*, and many others. We shall only speak of *Services* under this Head, leaving the other Particulars for a more proper Place.

¶ *Servitus*, a Service, is a Right by which one *Thing* is Subject for Use and Conveniency to another *Thing* or *Person*, contrary to common Right; and not where one *Person* is subject to another *Person*, as was mention'd in the first Book; though according to that Pattern these Rights are call'd Services.

Of *Services* some are *predial*, some *personal*.

I. *Predial* or *real* Services, are Rights ° which one Estate owes to another Estate; as because I am Owner of such a Ground, I have the Right of a Way through the Ground of another; or because I am possessed of this House, my Neighbour cannot beat out a Window out of his own House towards me, or build his House higher without my Leave. Here one is the *ruling* Estate, the other subject to the Rule; either to *suffer* something from the other, or *not to do* a Thing without the Leave of the Owner of the ruling Estate. Both these Estates must be in distinct Proprietors; ° for a Man's Estate cannot ° D. 7. 6. 5. owe a Service to himself. And as Estates are either *Rural*, as Lands, Barns, Stables, &c. or *City* Inheritances, as Houses for Habitation; so predial Services are subdivided into *Rusticas* & *Urbanas*, *Rural* or *City* Services.

° D. 8. 1. 1.
Of Predial
Services.
° I. 2. 3. 3.

P p

Rusticae

¶ *Servitus est Jus quo Res alterius Rei vel Personae servit.* D. 8. 1. 1.

° *Nemini Res sua servit.* D. 7. 6. 5. D. 8. 2. 26.

Rustica, or rural Services, are,

- ^a I. 2. 3. 1 & D. 8. 3. 7. 1. ^u *Iter*, a Right for a Man to go on Foot or Horseback, or in a Sedan, over another Man's Land to his own.
- ^w Ibid. 2. ^w *Actus*, a Right of walking, riding, driving Cattel or a Cart over another's Land. There may be *Actus* also without the Right of driving a Cart.

And that we vulgarly call a pack and prime Way.

- ^x Ibid. 3. ^x *Via* or *Aditus*, a Right of Walking, Riding, driving Cattel or Carts, and also of drawing Stones, Timber, and even of leading an Army, so it be done without Damage to the Corn or Grass, within a ^y Space consisting of eight Foot at least straitways, and of sixteen Foot upon Turnings.
- ^y D. 8. 3. 8.

This with us is either the King's Highway or the Common Streets.

- ^z D. 8. 3. 13. 2. The Space of ^z other Services of this Nature are not so determined by Law.

- ^a I. 2. 3. 4. ^a *Aqueductus*, or a Right of bringing Water by a Pipe or Rivulet thro' another Man's Land to my own, ^b without Prejudice to Navigable Rivers or any other Man's Estate.
- ^b D. 43. 12. 2.

- ^c I. 2. 3. 2. 5. A ^c Right of *drawing Water*, and of *watering Cattel*, a Right of *Common*, and of *Pasturing*, of *Hunting*, *Hawking*, *Fishing*, of *making Lime*, *Digging Gravel*, Chalk, Stone and Sand, for the Use of my Estate; ^d but not for other Uses, as to make earthen Vessels, &c. For the Service must be made use of only for the Profit of the *ruling Estate*.
- ^d D. 8. 3. 5 & 6.

- ^e D. 50. 16. 197. ^e *Urbana*, or *City Services* belong to Buildings, and Houses erected for Habitation of Men, and not for Corn or Cattel, unless they are as ^f Out-houses to the principal Mansion: Of this Nature are ^g Gardens made for Pleasure, and the Ground appurtenant to it. They are called *City Services*, though the Buildings are in Villages and in the Countrey, for it is the *Use* which the Buildings are put to that makes them either *Rural* or *City Inheritances*, and not the *Place* where they stand. These Services of *City Inheritances* are either *Affirmative* or *Negative*, whereas *Rural Services* are *Affirmative* only.
- ^f D. 20. 2. 4. 1.
- ^g D. 50. 16. 197.

- The *Affirmative Services* are: 1. That the Wall of my Neighbour's House shall bear the Burthen of my Building, and ^h which he shall be bound to repair.
- ^h D. 8. 2. 33.

- ⁱ D. 8. 2. 2. 2. ⁱ That he shall be bound to build his House higher to defend mine from Wind and Weather, where perhaps he was before restrained of his natural Liberty to build as high as he pleased by the Governors of the City, who often enjoyn Uniformity in Buildings. These ^k Services are contrary to the Nature of other Services, which consist only in *suffering*, or in an Obligation *not to do*, whereas *these* oblige to *Act*.
- ^k D. 8. 1. 15. 1.

- ^l D. 8. 2. 2. 3. ^l That a Neighbour shall suffer me to fix a Beam or Piece of Timber or Stone in his Wall.

- ^m Ibid. 4. ^m That my Building may project, so as Carts and Carriages shall be forced upon his Ground.

5. ⁿ That

5. ⁿ That the Eves of my House (called *Suggrunde* or *Suggrundia*) may hang over to protect my own Walls from the Rain. ⁿ Ibid.

6. ^o That I may turn the Droppings of the Eves of my House on my Neighbour's House or Ground; or that I may receive the Droppings of his Eves into my Cistern; which may be beneficial where there is want of Water. ^o Ibid.

7. ^p That my Sink or Gutter shall run thro' his House. ^p D. 8. 1. 7.

8. ^q That I may beat out what Lights and Windows I please against him. ^q D. 8. 2. 4.

9. ^r That I may have a clear and pleasant Prospect from my House. ^r D. 8. 2. 15.

In England this is not Law.

10. ^s That I may have a Way or Passage thro' the House or Back-side of another. ^s I. 2. 3. 1 & D. 8. 3. 7.

These are Rural and Country Services, yet when *applied* to City Inheritances, they are City Services; for as to the last Instance, it often happens that one Neighbour may go up the Stairs of another to his own Chamber, &c.

The *Negative* Services are: 1. That he shall ^t not turn the Droppings of the Eves of his House upon my House or Ground. ^t I. 2. 1. 3.

2. ^u That he shall not darken my Windows by Building, or otherwise. ^u Ibid.

3. ^w That he shall not hinder my Prospect by building or planting of Trees. ^w D. 8. 2. 15.

4. That he shall not make any Windows to overlook me, and by that Means take away the Privacy which every Man desires in his Dwelling. If I have no Service upon him in this Instance, he may make as many Windows as he pleases, but then I may erect Sheds against them and so make them useless, except the Windows have been Time out of Mind.

This is every where practised. Vide *Perezium* in Lib. 3. Cod. tit. 34. Num. 18.

5. ^x And lastly, That he shall not build his House higher without my Leave; otherwise of common Right, he may build as high as he thinks fit, ^y tho' my Windows are darkned by it. Yet he ought not (generally speaking) to build ^z contrary to the Form of the *ancient* Building, or exceed the usual Height, neither ought he by any new Erection to hinder the ^a Wind from coming into my Barn, which is necessary for the winnowing of my Corn. But if it is a Controversy to what Height the Building may be erected, it must be decided by the local Laws; and if there are none, the whole Matter ought to be left to the Direction of the ^b Judge; who must ^c enquire how the Buildings have been formerly, and have an Eye upon the Form of the neighbouring Houses. If any thing is done ^d contrary to it he may reduce the Building to its proper Form, and pull down that which was irregularly built, at the Charges of the Person that erected it. ^e C. 3. 34. 8. ^f D. 8. 2. 9. ^g C. 8. 10. 1. ^h C. 3. 34. 14. ⁱ C. 3. 34. 1. ^j C. 8. 10. 12. ^k C. 3. 34. 5.

II. *Personal Services* are those Services which are due from a Thing to a Person. By some these are called mix'd Services, and they are

are many and various, but without any certain Name, except three, which are call'd *Usufruct*, *Use*, *Habitation*.

- ^e D. 7. 1. 1. I. *Usufructus* is a ^e Right of using and taking all manner of Profits of a Corporeal Thing belonging to another Person without Diminution or Prejudice to the Propriety of it. It cannot continue for a longer Time than the ^f Life of the Person that claims this Right: It certainly cannot be for ever. But if the Heir of the *Usufructuary* is nominated also by the Testator, & two *Usufructs* are appointed; for it cannot come to the Heir by Descent; and if it is given jointly, the ^h Survivor shall have the Whole. It may be constituted for a ⁱ less Time than the Life of the *Usufructuary*, upon ^k Condition and in a certain Manner only; but whosoever has this Right, may take to himself ^l all manner of Profits arising out of the Thing, and dispose of those Profits as he pleases, by ^m selling or letting to Hire, &c. as much as the Proprietor himself might have done, if the Profit of it had not been given from him. Yet the *Usufructuary* shall stand to small ⁿ Repairs to preserve the Buildings; he shall pay the ^o Taxes and other Duties laid upon it unless there is an Order by the Testator or some Agreement to the contrary. He ought not to cut down ^p Timber Trees unless for Repairs; nor Trees bearing Fruit, for hereby the *Proprietor* would be injured. ^q If he builds upon the Estate he cannot afterwards take it down.
- ^r D. 7. 1. 68. 1. He must take care of the Cattel that are sick, ^r recruit their Number if any die, plant young Trees in the Place of those that are fallen, unless they fall by an inevitable Accident; and in general must act as a wise and prudent ^s Man would act upon such an Estate. And because the *Usufructuary* cannot claim the Profits of the Estate or Thing, unless he has actually received them and separated them, as Corn and Hay from the Ground, Grapes from the Vine, Wooll from the Sheep, Milk from the Cow, &c. therefore if he dies ^t before they are separated from the Soil or Thing, they shall not pass to his Heir, but shall belong to the Proprietor; [or to him in Reversion] for by the Death of the *Usufructuary* the Title does vanish; so that he cannot have a ^u proportionable Rate according to the Time that he was in Possession; neither does this seem unjust that the Proprietor should take the Product of the Pains and Labour of the *Usufructuary*, for on the contrary, the *Usufructuary* receives all those Profits that are ^w not separated from the Soil or Thing (perhaps of the whole Year) though his Right commenced at the latter End of that Year; yet that ^x Heir shall claim the Expences and Charge which were laid out upon the Tillage of the Land; for Equity suggests, that the Proprietor should not be enrich'd at the Loss of the *Usufructuary*. Farther, if a Tenant has received the whole Profits of the Land for that Year, the Heir of the *Usufructuary* shall have the ^y Rent, though the *Usufructuary* died before the Day of Payment agreed on; for the *Usufructuary* has no more or less than if he had held it in his own Hands.

An

^e *Usus fructus est Jus alienis rebus utendi fruendi salva rerum substantia.* I. 2. 4. pr.

^p *Fruentarius causam Proprietatis deteriore facere non potest, meliorem facere potest.* D. 7. 1. 13. 44.

An *Usufruct* is two-fold, *verus* (a proper *Usufruct*) and *quasi* *Usufructus* (an *Usufruct* improperly so call'd.)

A true and proper *Usufruct* consists in a Right of taking the Profits of those Things which do not perish in the using; as the Right of taking the Profits of Land, Houses, Cattel, and Bondmen.

An ² *improper* *Usufruct* is of those Things which perish in the using, as of Wine, Oyl, &c. also Money; for that too by continual Exchange seems to vanish from us; as if the Use of so much Money for Life were given in Legacy, upon Security and Caution that so much should be repaid to the Heir by the Legatee when he died; or so much Wine and Oyl, upon Caution and Security, that at the Time of the Death of the Legatee, the Value of it should be repaid to the Heir in Money.

^a Caution or personal Security is to be given of necessity in an improper *Usufruct*, either to return the *same* Thing in Kind, safe and sound, or the *Value* of it when the *Usufruct* is at an End; for *Caution* belongs to the very Substance of it, and must be given of Course, unless remitted. This *Caution* makes an improper *Usufruct* to differ from *borrowing*, *letting to hire*, &c. for there Caution is not of Necessity. Now it shall not be esteemed to be returned safe and sound, if the Substance and *Form* of it is changed, which may be done, tho' the Estate is ^b *improved* and the better for it.

^a Ibid.

^b D. 7. 4. 16;
& D. 7. 8. 23

In the Laws of England there is scarce any Mention of such *Usufructs* *as were amongst the Romans. An Estate for Life, for Years or at Will of the Lord, &c. are almost of the same Nature. But these* *Usufructs* *may be created amongst us by Agreement or by Testaments.*

2. *Usus*, the Use of a Thing, being a personal Service (because due to a Person) is ^a *a Right of using only a corporeal Thing belonging to another without Prejudice to the Propriety of it.* This using does not consist in taking the Profits, for tho' an *Usufruct* comprehends an *Use*, does ^d not comprehend an *Usufruct* or a Right to take the Profits; ^d D. 7. 8. 14. 1. for he that has this Right cannot take the Profits generally, but only for his ^e daily *Use* and necessary Subsistence, according to his ^e I. 2. 5. 1. Quality and Character. ^f He will be restrained if he use more; but ^f D. 7. 8. 22. the *Usufructuary* may take Things for Pleasure, may claim all manner of Profit, and make all Manner of Advantage.

He that has the Use of Land given him, may ^g take for his daily ^g D. 7. 8. 12. Use, and the Use of his *Family*, all manner of Herbs, Apples, Hay, ¹ Straw and Wood, and also Corn for Bread, with other Fruits of the Land, if he that has the Use will bear a proportionable Share of the extraordinary Charges in Sowing, Plowing, and of the Husbandry about it. And if the Profits of the Land are only sufficient for the Use of his Family, it is equitable that the Person that has this Use should ^h alone be at the Charges of manuring it. When I ^h D. 7. 8. 18. say he shall take only for his daily Use, I do not intend that he is restrained from laying up a Store for a longer Time, perhaps for a

Q q

Year;

^a *Usus est Jus alienis rebus utendi ad Usum quotidianum salva rerum substantia. I. 2. 5. 1. Minus Juris est in Usu quam in Usufructu. I. 2. 5. 1.*

- ⁱD. 7. 8. 5. ¹Year; but if any thing remains at his Death, the Proprietor shall have it, not the Heir. But when he is taking these Profits for his necessary Subsistence, and when he is Resident upon the Land, he ought not to be ^k an Hindrance to the Proprietor or his Workmen; neither must he pretend to sell his Right, or let it out to Hire, or assign it over to others; for this Right is allowed only to his *own* ^lD. 8. 7. 12. 1. *Person*, and another might be of an ⁱ higher Character, and have a larger Family, which would be a greater Burthen to the Estate of the Proprietor. Yet this cannot be a general Conclusion, for sometimes it may appear by Circumstances, that the Testator design'd that the Use might be sold or let to Hire; as if the Use of a ^m Wood lying afar off (where Carriage would be chargeable and more worth than the Wood itself,) were given by Legacy; unless it were lawful to cut down some Wood and sell it, the Legacy might be to no Purpose or Advantage. And if the Testator should give by Legacy the Use of Horses to one that got his Living by letting Horses out to Hire; the Trade of the Legatee is such a Circumstance, that it ⁿD. 7. 8. 22. may easily be believed that the Testator ⁿ designed they might be let out.

- He that has the *Use* of an House must inhabit there himself, and not transfer it over to others; which is required also in other *Uses*. And excepting the Restraint of this Liberty, the Person that has the Use of an House given him, has it as *large* as if he had the Usufruct thereof. And tho' it is said that he cannot transfer his Right, it is not to be understood that he must live alone there; for if he inhabits there himself, he may let out Part of the House upon a ^o Rent; which Part would be otherwise useless to him, as being too large for his Family, but this is not a transferring his Right, unless ^pD. 7. 8. 2. 1. he too forsakes it. He may receive a ^p *Guest* either for Money or Friendship (tho' this was doubted of heretofore) as well as his Wife's Children, Freemen and Bondmen. He cannot make a publick Inn ^qD. 7. 1. 13. 8. or Tavern of it for the Reception of all Sorts of Strangers and Travellers. It must be confin'd to his own Family, which though it shall daily encrease afterwards may still be receiv'd, unless the Person appointing the Use has directed the contrary. If a married Woman has such an Use given to her upon ^rD. 7. 8. 8. 1. Condition that she shall live apart from her Husband, the Condition shall be void, and the Husband and his Family may live with her. If a ^sD. 7. 8. 4. 1. Virgin or Widow has such Gift or Legacy, the Husband which she shall *afterwards* marry shall also be received.

- He that has the *Use* of Cattel for Carriage may employ them, not only for himself ^t but for his Wife and Children. He shall have the Profit of what they earn, if they are employ'd about the ^u Affairs of him that has the Use of them given to him. ^uD. 7. 8. 20. ^tD. 7. 8. 12. ^{§ 5 & 6.}

- Thus the Cattel as Horses, Mules, Asses, Oxen may be employ'd ^wD. 7. 8. 12. 3 & 4. to ^w plow, draw, and carry Burthens, according to the Custom of the Countrey; but cannot be let out to Hire for the Advantage of him that has the Use; unless the Testator would have it so, or unless *otherwise* the Legacy would be ineffectual, and to no Purpose, as abovementioned. In the *Use* of other Cattel, as Cows, Sheep or Goats, he that has the *Use* cannot take the Milk, Wool, Lambs or Kids; for those belong to the Usufructuary; but he may make use of them to dung his Land; and if he ^x takes a small Quantity of ^xD. 7. 8. 12. 2. Milk,

Milk, it will be allowed of; for last Wills and Testaments are not to be interpreted strictly.

3. *Habitation* is a personal Service, and a ¹ *Right of a Person to live in the House of another without Prejudice to the Propriety.* I. 2. 5. 5. He that has only the Use of an House, has not so much as he that has *Habitation*; for he that has *Habitation* may sell his Right or let it to Hire, tho' he does not live there himself; which he cannot do that only has an Use.

It differs from Usufruct, because the *Usufructuary* may employ the House to other Purposes than to live in it; but he that has *Habitation* can use it no otherwise than for a Dwelling.

In the Laws of England Use is as large as Usufruct in the Civil Law; and he that has the Use of Land hath the Land itself. 27. H. 8. C. 10.

But as to such Uses and Rights of *Habitation* as were amongst the Romans, tho' our Laws have not treated of them in any particular Manner; yet they may be granted and acquired by special Covenants and Agreements, as was said of *Usufruct*; and (as they are here treated of) may serve for the Interpretation of the Feudal Law.

CHAP. III.

How Things or Rights may be acquired by the Law of Nations, or by a natural Right, viz. By Occupancy, Accession, Tradition or Delivery.

AFTER the Division of Things, as they are in the Property or *Patrimony* of single Persons, and as they are out of their *Patrimony*; or as they are *Corporeal* and *Incorporeal*; it follows that I should explain the Ways of acquiring Rights or Things, *First*, by the Law of Nations, *Secondly*, By the Civil Law.

By the Law of Nations, or by a natural Right, one may acquire Things or Rights three several ways. *First*, by Occupancy. *Secondly*, By Accession. *Thirdly*, By Tradition. Which general Division I have made for Memory sake, but must acknowledge that it is not exact.

The Ways of acquiring by the Law of Nations, or by a natural Right. By Occupancy.

I. One may acquire by ² *Occupancy*; which is a Possession of those Things that belong to no private Person, but are capable to be made so by it. From which *Divine* and *Holy* Things, and those of a publick Nature, &c. are exempt.

Under *Occupancy* may be comprehended, *Seising* or *Occupancy* so specially named; and *Finding*.

1. *Apprehensio* or a ¹ *Seising*, is either of wild Creatures or of Things taken in War. I. 2. 1. 12 & 17.

Those

¹ *Habitatio est Jus alienas ædes inhabitandi salva earum substantia.* I. 2. 5. 5.

² *Quod nullius est, id ratione naturali occupanti conceditur.* D. 41. 1. 3.

Those *Creatures* are *wild* which wander at large, and are under no Restraint. By which I do not mean those *Creatures* that are fierce and wild in their Natures, as Lions, Bears and Tigers; for they continue so, tho' under Confinement. Nor such *Creatures* as Peacocks, Pigeons, &c. which fly abroad and do return again; for he that *seizes* these, and detains them, or *entices* them away, is guilty of Theft.

Tho' they never return again the Owner does not lose his Property by the Laws of England, France, or Holland. Vinnii Com. lib. 2. tit. 1. 16.

I mean such *wild* *Creatures* which live under no Restraint, and belong to no Owner.

These may be seized by *Hunting, Fowling and Fishing.*

As to wild *Beasts* and *Birds*, they belong to the Person that first seizes them, by Hunting or Fowling, whether it be in his own Ground, or in the Ground belonging to others. But *Fish* are the Occupant's, if they are taken in the Sea and the publick Rivers; for if they are taken in ^b private Rivers and Ponds they belong to the owners of the Water. And altho' the *Beasts* and *Birds* accrue to the Occupant, yet the Owner may ^c prohibit an Entry upon his Ground; which if the Occupant will not hearken to, the Owner may afterwards bring his Action for that Entry. ^d If the *Beasts* and *Birds* are wounded, they are not supposed yet to be taken; for many Things may happen that they may escape; and therefore they shall belong to any other that can seize them, unless there is a Custom to the contrary. And indeed there seems generally to have obtained such a Custom among all Sportsmen, that it shall not be lawful for others to take away the Game which has been before wounded or almost run down. Of this the Judge shall determine upon Consideration of the Circumstances of the Fact. If a Hawk may be known by his Bells, or a Stag by something which he usually wore about his Neck, they ought to be sent back to the Owners.

^e D. 41. 1. 44. Suppose a Wolf shall take away a Lamb from my Shepherd, and another Person shall follow and at length rescue him; it shall be returned to me the true Owner, if there was any possibility left for me to recover it; but otherwise not. The same Answer is to be made in the Case of Shipwreckt Goods, and an Action lies for a Recovery in both Cases.

^f D. 41. 1. 55. If a wild Beast is taken by a ^f Snare which I had laid, and another takes him from me and releases him; it must be considered whether the Snare was laid in a publick Place or private; if in a private Place, whether in a Place belonging to myself or to another Person; if to another Person, whether I had his Consent or not; whether the Beast was so hamper'd that it was improbable he could get loose by struggling. If it was in my own Ground, or if the Snare was laid in the Ground of another Person by his Consent, and if it was unlikely that the Beast could escape, an Action lies for taking him away or for letting of him loose.

Under the Consideration of *wild* *Creatures* we may place *Bees*, which are also *wild* by Nature; therefore if they settle upon your Trees, they do not belong to you ^g before you have covered them with

^g L. 2. 1. 14.

with an Hive, no more than Birds that have built their Nests there, or the young ones in the Nests before they are taken. It is likewise lawful for any to take the Honey-combs from thence, tho' as before you may prohibit them from coming upon your Ground. But if they are once hived, the Honey-combs belong to the Possessor; and if the Swarm flies from your Hives, they still belong to you as long as they are in Sight, and under any Probability of Recovery, or if they continue their Custom of flying abroad and returning.

The^h Canonists allow fishing with Rods to be a proper Recreation^{h c. 11. 86.} for Clergymen,ⁱ but prohibit them the Diversions of Hunting; yet^{Dist.} there are Doctors of great Authority on the contrary which allow^{i c. 1 & 2.} them that Liberty, if for Health, and not merely for Pleasure. Pa-^{X. de cler.} ven. 1 & 2. normitan. & alii. But the Common Law of England plainly allows^{& 3. 34. Dist.} it. 4 Inst. 309.

It is urged that to Hunt, Fish, and Fowl in publick Places is originally permitted by the Laws of all^k Nations, and confirmed^{k I. 2. 1. 12.} by the^l Civil Law, as convenient for furnishing the publick Mar-^{l D. 50. 6. 6.} kets; and that a Prince is injurious to his Subjects, who makes Laws to prohibit them this natural Liberty, unless they have resign'd up that Liberty by their own Consent. But it is most true, that a subsequent and later Law of Nations has given this Power to Princes as well as immemorial Custom, and constant Exercise of it. For it is rational to suppose, that Princes should have the same Authority in publick Places which are held of them, as private Persons have in their own particular Estates. Besides this Power is for the common Good: First, for the Preservation of the several Species of untamed Creatures, which would be soon destroyed by a general Liberty. Secondly, for Prevention of a Neglect in Husbandry and Trades, which would suffer by such Avocations of the Countrey People, and Artificers. Thirdly, because the Hunting of wild Beasts and other untamed Creatures, is frequently attended by a great Number of ordinary People in Arms, which may be of ill Consequence to the Commonwealth. I do not apply this last Reason to Fowling and Fishing. Lastly, Because Quarrels and Contests may probably arise with the owners of the Soil, and upon Division of the Game, where all may pretend an equal Title. Therefore what is gain'd now by Hunting, Fishing, or Fowling, does not belong to the Occupant but to the Prince, or those that claim under him; for this Power of the Prince is now allowed farther, even to prohibit private Persons to hunt in their own Estates without Licence; which seem'd injurious at first, but now this Law is settled either by the general Consent of the Owners, or by Prescription which supposes it.

By the Statute Laws of England, no Person except such as are particularly qualified, either by their Birth or Estates, may keep any Guns, Dogs, or any Engine to destroy the Game, under severe Penalties. 22 & 23 Car. 2. c. 25. 3 & 4 Will. & Mar. c. 10. 5 Annæ c. 14. 3 Georg. ch. 11. &c.

It is Death in Germany to Hunt in the Woods, and Fish in the Ponds belonging to the Princes and Nobility. Matheus de Crimini- bus. c. 3. tit. 1. § 5.

A *Seifure in War* is where not only the *Persons* of our Enemies, but their personal and movable *Effects* are ^m acquired to the Conquerors by *Occupancy*. ⁿ *Immovable Things*, as Cities, Towns, Castles, Houses and Lands do not belong to the Occupier, but become the Right of the Publick, and conquering Prince; ^o who sometimes did distribute them as Booty to the most deserving Soldiers, and thence seem'd to have laid a Foundation for the *Feudal Law*.

^m I. 2. 1. 17.
ⁿ D. 49. 15.
20. 1.
^o D. 6. 1. 15.
2. & D. 21. 2.
11.

At this Day the Persons of our Enemies taken in War are not reduced to the Condition of Bondmen or Slaves amongst Christians, but may be ransom'd by Exchange, or by a Sum of Money, pursuant to the Chartels and Agreements on both Sides, yet Prisoners taken between Christians and Mahometans are generally sent and sold into Slavery; the latter forcing the others to such Methods by a barbarous Usage of Christian Prisoners. Constitutio Caroli 5. Anno 1542. Spiræ edit.

This *Seifure in War* is not lawful unless the War too be just and lawful; ^p neither will a *Seifure* give a Right to those Things which the Enemy before had taken from our Fellow Citizens or from our Allies.

^p D. 49. 15.
20. 1.

Some distinguish between the publick Acts of War and private Exploits which happen upon account of the War. That Things immovable belong to the Publick, it is agreed on all Hands; but some say, if Things movable are taken too upon a publick Action, that those also belong to the Publick, for that the Soldiers are the Servants of the People. But if there is any Engagement by Parties, not publickly commanded, or by Permission of the Superiors, then the Booty belongs to the Occupants; for in such a Case they do not act as Servants to the Publick. Such are the Spoils which are taken from the Enemy in single Combats, or far from the Army in voluntary Skirmishes. At this Day it is almost every where observed, that each Man shall keep that which he can seize on, either by plundering Towns, or by Battels; and that whatsoever is got by the skirmishing of Parties, it shall be divided to each Person according to his respective Post and Station.

^q D. 50. 16.
118.

Those are called ^q Enemies (*Hoftes*) against whom the Romans did publickly declare War, or those who publickly denounced War against the Romans; others are rather to be termed *Pirates* or *Robbers*.

^r I. 2. 1. 18
& 22.

2. *Inventio*, or *Finding* (the other Species of Occupancy) is properly of inanimate Things, and may be considered either with respect to those Things that never were in the Possession of any Person, as an ^r Island in the Sea, precious Stones and Gems in the Sea, and upon the Shore, which by the Law of Nations belong to him that finds them, I mean to him that has the first Possession of them; ^s for it is not sufficient that you first see them, or first move toward

^s D. 41. 2. 3.
3. C. 8. 41.
13.

^q *Hoftes hi sunt, qui nobis, aut quibus nos publice bellum decrevimus; ceteri latrones aut prædones sunt. D. 50. 16. 118.*

toward them, but you ought to be the first that should lay Hands on them, if Movables, or if Immovables, that should have first made an Entry; or with respect to those Things which are left by their Owners, as *Treasure* privately hidden, and *Derelicts*.

A *Treasure* or Money privately hidden of long Time (insomuch¹ that the Owner of it cannot be discovered) belongs all to the Person that finds it, if the Discovery was made in a Ground that has no particular Owner; as in a Religious or Burying-place; or in his own Ground² without Conjurat[i]on or Magick Art; for by that Crime³ it is forfeited to the publick Exchequer, and the Offender punished with Death. If it is found casually, and by Chance in the Ground of another (either publick or private) the⁴ Lord of the Soil, whether the *Prince* or a *City* or a *private* Person, shall have half or an equal Share with the Finder. But if the Discovery is made upon a *deliberate* Search, and with Industry in the Soil of another Person, either publick or private, that will alter the Case, and force the Discoverer to restore the Whole to the Owner of the Ground. To this Purpose a⁵ Tenant who only pays a small Pension out of his Estate granted to him *for ever*, or who hath a *long* Term of Years in it, is Owner of the Soil; and he, not the Lord or Proprietary, shall have the Benefit of the Discovery; for such a Possessor shall have all manner of Advantages arising from the Estate as much as the Proprietary himself had, if there is no Reservation to the contrary. But, why by the Law of Nations does not a discovered *Treasure* in the Soil of another Man upon Search and Industry belong also to the Occupant, as well as Birds, wild Beasts or *Derelicts*? The Reason of a Difference in the Law seems to be, because in those Cases there is no Prejudice to the Owner of the Ground, whereas a Liberty to dig after Money will create a certain and a manifest Damage. But then you will ask, why is not the whole adjudged to the Occupant only, as other Things are when the Finding is by Chance, as upon Ploughing in the Ground, and digging for its Improvement? I take it to be because Birds, wild Beasts, *Derelicts* and precious Stones found in the Sea, or upon its Shore, do really and truly belong to no body, whereas certainly the Money dug up has an Owner if he could be discovered; and it is most probable that it might be hid there by some of the Ancestors of the present Owner, who in Reason may be thought to have concluded that their own Grounds would be the safest Place, rather than those of any other.

Hence we may apprehend that if it is known who hid the Money, and who⁶ is the Owner, upon what Account it was hidden, (as for fear of Thieves, or in Time of War) the Finder can have⁷ no Title; but if he takes it he has committed Theft. *Vid. Postea*.

⁸ *Derelicts* are Things wilfully thrown away and abandoned, with⁹ an Intention to leave them for ever, which by the Law of Nations belong also to the Person that finds them. This Description seems only to be understood of Movables, that may be thrown away; yet there is no Doubt but that¹⁰ *immovable* Things also may be *Derelicts*; as when a Man hath left the Possession of his Ground with¹¹ an Intention that it should not be reckon'd Part of his Estate; it returns then to its former Condition, has no Possessor, and by natural Reason is subject to the first Occupant.

We must not reckon Things thrown away upon *Necessity* to be *Derelicts*, as ^b Goods out of a Ship in a Tempest to lighten the Burthen of it, though in part it is a voluntary Act; for he that seizes them on the Sea, or when they are drove to Shore, with an Intention to retain them, is guilty of Theft, and punished with a ^c *Confiscation* of all his Goods; ^d neither can the Exchequer in so calamitous a Case pretend a Title to them.

Things lost by *Negligence* or *Chance* are not to be esteemed as *Derelicts*, for the Finder in both these Cases ought to save himself from the Imputation of Theft, by giving ^e publick Notice of what he hath taken up; and if no Owner appears, a poor Man may retain them as sent by Providence, but a rich Man would do well to bestow them in charitable Uses. However, it is agreed that the Finder ought not to demand a Gratuity, if he has been at no Charge, though he may honestly ^f receive what is voluntarily offer'd to him.

By the Laws of England, Treasure trove is when any Gold or Silver in Coin, Plate, or Bullion hath been of ancient Time hidden. Wheresoever it be found, and where no Person can prove any Property, it doth belong to the King, as in Germany, France, Spain, Denmark. Grot. de jure belli. l. 2. c. 3. n. 7. Or to some other by the King's Grant, or by Prescription. For such Goods whereof no Person can claim Property belong to the King, as Wrecks, Strays, &c. 3 Inst. c. 58.

But if Treasure be found in the Sea, the Finder shall have it.

Wrecks at Sea belong to the King, or to the Subject by Grant from him, or by Prescription; unless either Man, Bird, or Beast escape alive from the Ship; or unless there are such Marks on the Goods, whereby it may appear that they belong to any particular Owner that shall challenge them within a Year and a Day after the Seizure. 2 Inst. West. 1. c. 4.

By the Laws of Holland, the Owner is allow'd a Year and a half to make his Claim. Vinnii Com. lib. 2. tit. 1. § 47.

So Strays, if they be proclaim'd, and are not challeng'd by the Owner within the Year, they are forfeited to the King, or to the Subject by the King's Grant, or else by Prescription. Dr. & Stud. Dial. 2. c. 3.

But as for Derelicts, there is no such Law in this Realm; for though a Man forsakes his Goods or Estate, the Property still remains in him, and he may reassume them.

By Accession.

II. By *Accession* Things also may be acquired by the Law of Nations, ^g when one Thing is added to another. And this Accession is either *natural*, *artificial*, or *mixt*.

Natural Accessions are:

^h C. 3. 32. 7. ⁱ D. 6. 1. 5. 2. I. By *Procreation*, where any thing is born of our ^h Bondwomen, or of other Female Creatures that belong to us; for before the Young is brought forth it is part of the Bowels of the Female, and is only nourish'd

^g Accessio est modus acquirendi Juris Gentium, quo vi & potestate Rei nostræ aliam acquirimus.

^h Meum est, quod ex re mea supereft. D. 6. 1. 49. 1.

nourish'd by her, and while she herself too in the mean time is fed by *her* Matter only. Though others think it more natural that the young one should be in *common* to the Owners of the Male and Female; and that the young one is allowed to follow the Female only, where the Male that got it is unknown.

2. By *Alluvion*,ⁱ which is a secret Addition of Earth so insensibly, ^{i I. 2. 1. 20.} and by little and little cast upon another's Soil, that you cannot perceive the Manner of the Increase. For if the Force of a River shall ^k *apparently* carry away a Piece of Ground, and add it to the neighbouring Soil, it shall belong to the first Owner, till by Length of Time, and without any Endeavours to prevent it, they cleave together and are firmly united. This may partly appear if the Tree fix'd in a Piece of Ground, which was torn away, should spread its Roots into the other Part. ^{k I. 2. 1. 21.}

3. By the *rising* of an *Island* in a publick River (not in the Sea,ⁱ ^{i I. 2. 1. 22.} for that, as is before mention'd, belongs to the Occupant) which if it be fix'd in the middle of the River, and not floating, it shall be in common to those who have the Inheritance nearest to the Bank on each Side the River, according to the Breadth or Length of each Front. If it stands nearer to the Front of one Inheritance on either Side than to the other, that Inheritance or Estate has so many more Feet or Yards in the Island as it is nearer to it. But if the whole Island is nearer to one Inheritance than the other, that Estate shall claim the Whole. This is to be understood where the Lands on each Side have not any certain ^m Limits and Bounds; for if they ^m have, there can be no Claim or Title to such an Island, but it belongs ^{m D. 43. 12. 1. 6.} to the Occupant. If the River shall ⁿ divide its Course, and make ^{n I. 2. 1. 22 & 24.} an *Island* of Land, by uniting its Streams afterwards, or shall overflow a Ground; that Island shall not belong to any Occupant, or to the neighbouring Estates, but is still subject to its first Owner. An *Island rising* in *private* Rivers and Lakes wholly belongs to the private Persons who are Owners of those Lakes and Rivers.

4. ° By a *River's forsaking* its natural Chanel and gaining a new ^o ^{o I. 2. 1. 23.} one upon the Land of another. Here the old Chanel shall be divided between the adjacent Lands in the same Manner as an *Island* rising in a publick River, if those Lands were not under certain Bounds and Limits; and the new Chanel is now made as publick as the River. For though the River shall afterwards return to its old Course, yet in ^p ^{p D. 43. 12. 1. 7.} Strictness the new Chanel shall also be divided amongst the Owners of the adjacent Grounds as the old one was; but in ^q ^{q D. 41. 1. 7. 5.} Equity and Reason, it ought to be restored to the Owner. It is questioned, but without Reason, if the Course of a River is changed, which is the Bound of an Empire, whether the Limits of the adjacent Territories are not also changed?

Of *Artificial* Accessions there are many Kinds.

1. *Specification*, when from the *Substance* or *Matter* of another Person, a new Kind of Body or *Species* is produced. By such an Accession, he that made the new *Species* shall be the Master of the whole, if it cannot be easily reduced to its first State and Condition; as when one shall press Wine from your Grapes, or build a Ship from your Timber, you cannot claim the Wine or the Ship. But if the *Matter* may be cast into its *first* Condition, as a Vessel or Statue made of another Man's Silver or Brass, ^r the Property there- ^{r D. 41. 1. 7. 7.}

S f

of

of shall belong only to the Owner of the Substance whereof it was made. In the first Case where the Matter cannot be brought to its first State, a just Payment must be made for the Grapes and Timber, and in the other a reasonable Allowance for the Workmanship. But this Determination only takes Place in Favour of the Workman, where the Work was designed for his own Use, and where he erroneously, and by Mistake thought the Matter was his own. For if it was intended for the Use of any other, it is his upon the same Terms for whose Use it was working; and if it is known that the Grapes and Timber are another's, and yet thereof he proceeds to make his Wine or Ship, he shall lose his Labour and Workmanship; the Whole shall accrue to the Use of the Owner, and an Action may be maintained against him. The same Distinctions are to be observed if the Matter is partly the Workman's, and partly a Stranger's, where the Thing made cannot be cast into its first Matter. * If it can, each shall have his Share, or both may possess proportionably in common, according to that which is contributed.

2. By *Adjunction*; where we must consider which is properly the principal Thing, and which the accessory. Conjectures may be made from the Intention of the Agent. And though the Accessory should be of most Value, yet it does not lose the Denomination of an Accessory; as Purple is accessory in respect of a coarse Garment; a Jewel to a Gold Ring; though Gold may be accessory to the Jewel, as when that is made for the Conveniency of its Carriage, and the Garment may be accessory to the Purple, when that is made for the Sake of it. We are apt to call a Thing by the Name of a *Principal*, with respect to another Thing, when it is not; but perhaps they are both Principals, and usually go together, as a last Will and a Legacy; therefore if it cannot be determin'd which is the *Principal* and which is the *Accessory*, such Names ought not to be applied. Where one Thing is added for the sake of the other, there is a Foundation for it, and then only can the Accessory follow the Principal; and the Owner of what is *Accessory* must yield up the Possession to the Proprietor of the *Principal*.

This Rule holds, tho' the Addition of another Person's Goods to my own was knowingly, and dishonestly contrived; for here only Regard is had to the *Things* joyned and not to the *Person*, as before in *Specification*.

The Property of the Thing added is lost so long as the *Adjunction* continues, yet an Action lieth that the Thing added may by Sentence be separated and restored, at least for the Price and Value of it. If any one shall by Mistake and erroneously join one Thing of his own to something of more Value belonging to another as the principal Thing, supposing that to belong to himself; if he hath Possession, he shall keep the whole till he is paid the Value of the Thing added; but if this was done knowingly, and *malâ fide*, it may be interpreted as a Gift to the Proprietor of the *Principal*.

3. By *Confusion*, which is a Mixture of *Liquids* of the same Nature, as Wine and Wine; or of a different Nature, as Wine and Honey,

² Cum principalis causa non consistat, plerumque ne ea quidem quæ sequuntur locum habent. D. 50. 17. 178. Nec plus in accessione potest esse quam in Principali re. I. 3. 21. 5.

Honey, melted Silver and Gold. This *Confusion* being made by Consent of all, the Thing is in ^d Common; also if it is by Chance ^d I. 2. 1. 27. or Accident, the whole Body is possessed in Common, ^e unless there ^e D. 41. 1. 12. 1. may be a Separation without any Prejudice; as in a Mass of Gold and Lead; or if by the Consent of one only the Things are confounded, and a new Species is industriously produced as in *Specification*, he that made the Mixture shall be the Proprietor of the whole. A Confusion by *Accident* and Chance is here only to be considered as a Method of Accession and acquiring Property.

4. By ^f *Commixtion*, or a Mixture of *Solids*, which cannot be in ^f I. 2. 1. 28. common, unless by general Consent. For if by Accident two Bushels of Wheat belonging to two different Persons shall be mixed, the whole Heap ought not to be in common, because each Corn itself remains the same; but because each Grain cannot easily be distinguished by its Owner, the Judge shall divide the whole Heap, making a greater Allowance to one in Money or Corn, if his Grain was better or finer than the other. The same Amends ought to be made in such a Confusion of *Liquids*.

5. By ^g *Building*, either upon my own Ground with the Materials ^g I. 2. 1. 29. of another; or by building in another's Ground with my own Materials. In the *first* Case the Builder is the Master of the Building, because the Building follows the Property of the Soil. Here the Owners of the Materials by the Law of the twelve Tables shall be paid the double Value; for in no Case shall it be lawful for him to pull down the House for the sake of his Materials, lest the Regularity of the Buildings in Cities should by this Means be defaced. Neither shall any one take away his Perches that were made Use of to support another's Vine. But if the Building is not ^h fixed to the ^h D. 41. 1. 60. Soil, and may easily be removed, or if the Building should fall, he may then claim the Materials if he was not paid for them before. In the *second* Case also the ⁱ Owner of the Ground shall be Master of ⁱ I. 2. 1. 30. the House, but must pay for the Materials and Workmanship; otherwise the Builder is not bound to quit the Possession; unless the Builder certainly knew that he built upon another's Soil; ^k for then ^k C. 3. 32. 2. he shall be presumed to have given away his Materials and Workmanship.

By the Law of England, though one does ignorantly, or by Mistake of his Title, build upon the Soil of another, he cannot claim Allowance for his Materials or Workmanship.

If the Building is pull'd down, some think it just that the Materials also here should be restored. It is to be noted that the *Building* is one thing, and the *Materials* of the Building another; so that both may have Owners, but in a different Respect. What has been refer'd to building upon another's Soil, it is the same ^l Law touching ^l D. 41. 1. 28. Buildings upon the Wall of another.

Under this Head we may consider the Nature of *Expences* and ^m *Charges*, laid out upon another Man's House, and divide them ^m D. 25. 1. into Charges that are (*Necessariae*) *Necessary*, (*Utiles*) *Convenient*, ^{per tot.} or (*Voluntariae*) for *Pleasure*.

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^g Omne quod Solo inædificatur Solo cedit. I. 2. 1. 29.

ⁿ C. 3. 32. 5. The ⁿ necessary Charges laid out for the Support of the House, which cannot without Scandal or Offence be omitted, ought to be allowed by the Proprietor to the Person in Possession, because he is under an Obligation and Necessity to do it; ^o but if they were such Expences that were to be seen during his own time only, then he may make himself Amends by the mean Profits.

^p The Expences which were made only for *Conveniency* or *Pleasure* cannot strictly be demanded, but the Person *lawfully* in Possession may take away what hath been erected or made by him, if it can be done without Prejudice to the Right of the Proprietor, ^q unless the Proprietor will make an Allowance for the Advantages which the Person in Possession can otherwise make of them.

^q D. 25. 1. 8. & 9.

By the Laws of England, if Glass Windows, Wainscot, Benches, Doors, Furnaces, &c. annexed or fixed to the House be taken away or broken down by the Tenant, though they were fixed at the Cost of the Tenant himself, yet it is Waste, for now they are Part of the House. 1 Inst. 53. a. 4 Rep. 63, 64. 10 Rep. 13.

^r I. 2. 1. 31. 6. By *Planting*; where also the Tree belongs to the Owner of the Soil, if it hath taken ^r Root there. If it hath not fixed its Roots, the Property of the Tree remains in the first Owner of it. If all the Roots extend themselves into the neighbouring Soil, and not the Body of the Tree or Branches (such Roots I mean as draw Nourishment from thence, and without which the Tree could not live) then the Tree belongs to the Proprietor of that Soil; for more Regard ought to be had to the Roots from which the Tree is nourished, than to the Trunk or Branches. If it grows upon the Limits of the Ground belonging to several Persons, then the Tree and the Fruits of it are in common.

^s I. 2. 1. 32.

7. By ^s *Sowing*; for Corn also sown in another's Ground belongs to the Proprietor of the Soil, and he shall carry away the Crop. But in *Planting* and *Sowing*, the same Allowances are to be made as to a Builder upon another's Ground; ^t for there must be the like Law where there is the like Reason.

^u I. 2. 1. 33.

8. By ^u *Writing*; for there the Owner of the Paper or Parchment shall be Master of the Writing too; and though an History or Oration is drawn upon it, yet it is to be surrendered to the Proprietor of the Parchment or Paper; as a *Building*, Things *planted* and *sown*, must yield to the Proprietors of the Soil.

This indeed in general seems absurd, and the contrary Practice is observed by the Moderns; for suppose I should write my Accounts upon the Parchment or Paper of another which would be prejudicial to me,

ⁿ Impensæ necessariae sunt, quæ si factæ non essent Res aut peritura aut deterior futura sit. D. 50. 16. 79.

^p Utiles impensæ sunt, quæ Rem meliorem faciunt, deteriore esse non sinant. D. 50. 16. 79. 1.

^q Voluptuariæ expensæ sunt, quæ speciem, non fructum augment. D. 50. 16. 79. 2.

^r Statuæ affixæ basibus struilibus, aut tabulæ religatæ catenis, aut erga parietem affixæ, non sunt ædium, Ornatus enim ædium causa parantur. D. 50. 16. 245.

^s Ubi eadem Ratio, idem Jus esse debet. I. 2. 1. 32.

me, if they were communicated, and would be no Advantage to the Owner of the Paper; what Reason is there that I should be deprived of my Accounts, when I am ready to pay the Price of the Paper? Myns. Fabr. Vinus in locum.

9. By ^w *Painting*; where contrary to the former Reasons the Table shall belong to the Owner of the Painting, and not the Painting to the Master of the Table. And this is so order'd because of the great Esteem the Ancients had for this Art. The Table must be *movable*; for if the Painting is drawn upon a Wall or on a Table that is fix'd, it is otherwise.

Where I say that in these *Artificial* Accessions this Thing belongs to such an Owner, I mean that his Possession or Title is so far favoured, that it shall be in his *Election* to pay the Price and Value of the Thing added, or to quit the whole.

Mixt Accession is partly *Natural*, and partly *Artificial*.

This is only ^{*} *by taking and gathering the Profits* of an Estate, to ^x I. 2. 1. 35. which one truly and really thought he had a good Title by Purchase, Gift, Exchange, Descent, Legacy, &c.

The *Profits* arising from this Estate, and the *Persons* gathering and taking these Profits ought to be considered.

The *Civil* Profits are not here meant, as *Rent* or *Interest* for Money lent; but such only as are the *Product* of the Estate *itself*, and either arise *chiefly* by the Operation of *Nature* as Wood, Fruit, Grass, &c. or *chiefly* by the Labour and *Industry* of Man as Corn, Pulse, &c. It is disputed here whether the Young of Sheep, Cows and Horses, or Wool, the Hair of Beasts, or Hay is produced more by Nature than by Labour and Industry. But however, these Profits are subdivided into those that are still *depending* on the Estate, and those that are *actually gathered* and divided. Those that are *gathered* are again subdivided into those that are in *being*, and those that are *spent*.

The *Persons* are those that possess *bona fide*, and continue to do so. Those who have some Reason to think themselves the Proprietors, whether by Buying or Gift, shall keep all manner of Profits arising, either ¹ chiefly by the Assistance of Nature, or chiefly by Labour and ² Industry, as soon as they have taken them; ³ because some Allowances shall be made for an honest Possession, and for the Care and Husbandry. But if the natural Profits are gathered, and *not spent*, they ought to be restored after a Suit is commenced, and a Title is proved. And so of those gained by ⁴ *Industry*. ^{D. 41. 1. 48.} ^{C. 3. 32. 22.}

As some Interpreters contend, tho' the Moderns enquire only after the Profits arising since the Commencement of an Action or contesting Suit.

But a Possessor *mala fide* shall refund all manner of Profits and those that he ^b might have made, if there is no Colour of Title; ^b D. 6. 1. 33. and Allowance only being made of his Expences.

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^w Res abesse videntur quarum corpus manet & forma mutata. Plus est enim plerumque in manus pretio, quam in Re. D. 50. 16. 12. 1.

^z Bona fides tantundem possidenti præstat, quantum Veritas; quoties Lex Impedimento non est. D. 50. 17. 136.

It is questioned whether the Heir, not privy to the Fraud, shall make Allowances for those Profits that are spent.

It is affirmed upon these Accessions, that what the Roman Law has appointed in several of these Cases is not Reason or natural Equity, or the Law of Nations, but merely positive and Civil for the Benefit of Trade and Commerce; and there is scarce one Head in the Law where there are so many different Opinions of the Lawyers, and more frequent Mistakes. As if natural Equity did suggest in some of these Cases of Accessions that the Thing should be in Common, proportionably to what each one had contributed; and that in the Case of acquiring by taking the Profits an Allowance ought to be made to the Person in Possession only for his Expences and Labour.

By Tradition.

^d I. 2. 1. 40.

III. ^c By Tradition or Delivery Things may be acquired by the Law of Nations, or natural Right; ^d for nothing is more consonant to natural Equity, than to suffer the Will of the Donor to take Effect, when he would transfer any thing upon another. All Things would be of little Use or Advantage if they must constantly remain with one and the same Person; and by the Formality of a Delivery, rash Alienations are prevented, and Men forced to act with some Deliberation.

Delivery is twofold, True or Feigned.

^e Ibid.

I. A true Delivery is when a ^c *movable* Thing is given by the Hand to another; or if the Thing is *immovable*, when one is brought into the Possession of it. It is agreed that there is a Necessity to remove all Persons from the Land when Possession is taken, but it is disputed whether this is requisite upon transferring of the *Propriety* only.

^f D. 41. 2. 3.

^g I. 2. 1. 42.

Possession of ^f *Part* in the Name of the *whole* is sufficient, and that may be delivered by the ^g Owner himself, or by Proxy.

Others again contend, that by the Law of Nations a Delivery is not necessary; but that this Solemnity was introduced by the Civil Law.

^h I. 2. 1. 43.

2. A ^h *feigned* Delivery takes Effect more by the Intention and Sufferance of the Owner, than in any corporeal Act. The Use of it will appear to be necessary in the passing of *incorporeal* Estates,

ⁱ D. 41. 1. 43.

^j C. 8. 54. 1.

ⁱ which cannot be *really* and truly delivered. Thus the Delivery of a ^k *Deed* may be interpreted to be the Delivery of the Thing itself.

^l D. 23. 3. 43.

^m I. 2. 1. 43.

And in other Cases this *imaginary* Delivery is convenient for expediting Affairs, and avoiding useless Formalities, as in that Case which is called ^l *fiçtio brevis manus*; ^m where Goods are already in your Possession, as a Pledge or Loan, and afterwards they are *given* or *fold* to you. Here the *Supposal* of a solemn Delivery is thought sufficient. ⁿ So if my Debtor is ordered to pay a third Person a Sum

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^c Traditio est Datio Possessionis facta à vero Domino rei Animo alienandi & ex causa habili ad transferendum Dominium. — Id quod nostrum est sine facto nostro ad alium transferri non potest. D. 50. 17. 11.

^d Nil tam conveniens est naturali æquitati quam voluntatem Domini volentis rem suam in alium transferre Ratam haberi. I. 2. 1. 40.

^f Partis appellatione Res pro indiviso & diviso significatur. D. 50. 16. 25. 1.

^g Quod Jussu alterius solvitur, pro eo est, quasi ipsi solutum esset. D. 50. 17. 180.

of Money, it shall be interpreted to be my actual Receipt; ^o especially if I am present at the Payment. But now for the Benefit of Commerce a Payment upon any *Order* at a Distance, or by *Letter* is esteemed as my actual Delivery of the Money and my Payment. Thus the Delivery of the ^a Keys of a Granary or Cellar to a Buyer is the Delivery of the Corn or Wine in it. The Keys ought to be delivered at the very ^r Place where the Goods lay; because if the Delivery of them is at a Distance from the Goods, they are not *certainly* in the Possession of the Person that bought them. If there is no *Cause* or *Consideration* of the Delivery, the Delivery of the Keys must imply a *Trust* and Custody only. The Delivery of the Possession of Lands *in view*, and at a Distance by Words only to a Purchaser is a good Delivery. The marking of Timber by a Buyer with his Mark, by the Consent of him that sells it, the placing of an Overseer by the Buyer, upon Goods which cannot be presently removed because of their great Weight, &c. are rationally accounted to be effectually transfer'd as if solemnly delivered. ^u If two Persons buy the same Thing of him that is not the Master of it, he to whom it is delivered has the best Title, though the other made the first Bargain. ^x If the Delivery is not at the Time appointed, the Damages occasion'd by the Delay must be paid; those I mean that followed naturally from the Delay, not those that happened by extraordinary Events.

In all Deliveries let three Things be considered. First, the *Person*: Secondly, the *Thing*: Thirdly, the *Cause* of the Delivery.

1. The *Person* who transfers must be the *Owner* or one in the Place of an Owner, as Guardian or a Proxy; and the Persons concerned in the Contract on both Sides must consent to it. ^z One must deliver, the other must accept; and they must be of Capacity to convey and take. But there is no Necessity that the Delivery should be to a *certain* or known Person; for ^a Money or Medals thrown among the common People by the *Consuls* or *Priests* upon Festivals, thro' an Affectation of Popularity, is a good Delivery, and the Person that seizes it has a good Title; as at this Day it is allow'd upon the Coronation of Princes. These Gifts were afterwards forbidden amongst the *Romans*, ^b but since they were suffered to be performed with Moderation.

2. The *Thing* delivered (either really or feignedly) is *Corporeal* or *Incorporeal*. ^c But such Things must be delivered, which are not exempted from publick Commerce, for though here should be a Delivery of those, yet that would not be effectual, and there would be no Alteration of Property.

3. The *Cause*, *Title* or Reason to support the Delivery is to be enquired after; ^d for no Man can be thought to part with his Right, but upon some Reason. And though you will object that it is to no Purpose to require a Reason, ^e because if there is none, it shall be presumed to be a Gift. But even there a *Cause* will be *presumed*, ^f because the Gift is not irrevocable, unless it seems to be made advisably and with Deliberation. 'Tis not pretended that there must be a *real* Cause; it is ^g sufficient if the Person making the

^z Non videntur data, quæ ex tempore quo dentur, accipientis non fiunt. D. 50. 17. 167.

the Delivery did *imagine* or had an Opinion that there was one, tho' he was mistaken in it. But here lies a Question; if I deliver to you for this Reason, and you accept of it for another, whether this Disagreement in the Cause prevents an Alienation; as if Money is only deposited in your Hands for Custody, but you receive it as *lent* or *given*; no Man will say that here is an Alienation of the Property by this Delivery; for the Persons contracting, do not mean the same Thing, ^h which is requisite upon the passing away of any Right. Put the Case higher, what if both Parties intend an Alienation by the Delivery, and are persuaded on both Sides that there is sufficient Cause for it, and yet do not agree in their Opinions upon that one sufficient Cause? Thus if I deliver Money as a *Gift*, and you accept of it as *lent* only; here each *Cause* on either Side is sufficient for Alienation, which was not so in the other Case; and therefore I think such Delivery may well take Effect, and that the Disagreement in Opinion on *that* Reason shall not prevent it, where there is an Agreement in the *Thing* itself. This Decision is generally approved of by *Julian*, tho' ^k *Ulpian* is thought by some to dissent from him in this very Instance of delivering Money as a *Gift*, and of accepting it as a *Loan*; for He says it is neither a Gift nor a Loan, and therefore the Money seems not to belong to the Receiver.

^h D. 44. 7. 55.

ⁱ D. 41. 1. 36.

^k D. 12. 1. 18.

Selling is a good Cause of Delivery; yet it hath this peculiar to itself, that upon bare Delivery the Property of the Thing does not pass to the Buyer; because it is necessary that there should be also a *Price* paid for it, or Security, or a Promise of Payment made and accepted; ^l otherwise the Thing so delivered may be recalled.

^l I. 2. 1. 41.

Note, that *Delivery* (and not Contract) is reckoned as a distinct Instance of acquiring by the Law of Nations from *Occupancy* and *Accession*. *Delivery* is applicable to all Contracts, for by Contracts Things are *Due*, but the Property is altered by *Delivery*.

In the Laws of England, a Cause, or Consideration is threefold. First, The Cause or Consideration of Money something of Value. Secondly, The Consideration of Marriage. Thirdly, The Consideration of Blood or natural Affection. Without one or more of these Considerations, no Estate at all passeth upon the Delivery in a Bargain and Sale; nor on any other Conveyance to defraud Creditors or Purchasers. 13 Eliz. 5. 27 Eliz. 4.

CHAP.

^h In omnibus Rebus quæ Dominium transferunt, concurrat oportet Affectus ex utraque parte contrahentium. D. 44. 7. 55.

C H A P. IV.

How Things or Rights may be acquired by the Civil Law, or by Positive Law, viz. By Prescription, Gift, Succession, viz. By Testament, Succession by Law to an Intestate, and Succession by the Grant of the Bonorum Possessio.

BY the Civil Law, or positive Laws of the Romans, Things may be acquired
 1. By *Usucapion* or *Prescription*. It is called *Usucapion*, because a Man may *Usu rem capere*. How Things may be acquired by the Civil Law. By Prescription.

It is of Things *Corporeal* or movable only; whereas *Prescription* is of Things immovable or incorporeal, as of Lands or Rights of *Actions*, &c. ^m Justinian hath taken away all other Distinctions between them, but they are frequently confounded and one taken for the other. C. 7. 31. 1.

Usucapion or *Prescription* is defined to be an ⁿ Acquisition of Property by a Continuance in the Possession of it for so long Time as is required by Law. Prescription therefore is nothing else but a continued Possession. The Original of this way of gaining Property is from the Law of the twelve *Tables*, and the *Greeks*. D. 41. 3. 3.

The Jewish Law has forbidden it, as also perpetual Alienations. All Lands were to be restored to the true Owners at the Jubilee. Lev. xxv. 8.

This Policy was brought into the Commonwealth, not for the natural Reason or Equity of it, (for it is Injustice to deprive an Owner of his Right against his Will) but for the sake of Government; that the ^o Property should be ascertained and Trade encouraged, ^p and that there should be some End of Controversies, by inflicting such a Punishment on the Negligence of the true Owner: Neither is the Law of Nature changed here, which directs that every Man should have what is due to him; but that Law in this *Particular* only is altered by a superior Law of Nature, which enjoins that publick Societies of Men ought to be maintain'd, tho' some private Persons suffer; and that if a Man does subject himself to those Laws which bring in Prescription, he does consent to the Consequences of it. D. 41. 3. 1. P D. 41. 10. 5.

We must say then that Prescription is founded on a presumed Dereliction. There are five Requisites to support it.

1. ^q *Bona fides*, a good Conscience and honest Design in the Person pretending to a Prescription; so that bare Possession is not sufficient. This good Conscience and Honesty will appear; if Possession

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ⁿ *Usucapio est adjectio Dominii per continuationem possessionis Temporis lege Definiti.* D. 41. 3. 3.

^o *Dominia Rerum non debent esse in incerto.* D. 41. 3. 1. *Videtur alienare qui patitur usu-* capi. D. 50. 16. 28.

^p *Usucapio constituta est ut aliquis Litium finis esset.* D. 41. 10. 5.

was had from one who was esteemed by him to be the true Owner at the Time of the Delivery, except in the Case of Buying, where
^r D. 41. 4. 2. *bona fides* is required not only at the Delivery, ^r but also at the Time of making the Bargain. By the *Civil Law* the Prescription is not interrupted, though the Person *afterwards* knows that the Thing delivered came not from the true Owner, ^s for by this Law it is sufficient that there were no ill Practices at the beginning.

^r c. Possessor. *But by the Canon Law, if at any Time the Person prescribing is*
^{2. De Reg. Jur.} *conscious to himself that he derives his Possession from a Wrong-doer, the Prescription is interrupted, and wholly ceases; and this some Interpreters say ought to be observed in the Courts of the Civil Law, and that it is accordingly so practised in the Imperial Chamber, and throughout the Empire. Minl. observ. cam. cent. 5. observ. 6. Gail. 2. observ. 18. num. 7.*

^u D. 41. 3. 27. 2. A just, particular and ^u real Cause or Title is required, as by Sale, Exchange, Gift, &c.

Such a Cause as would entitle the Receiver to the Property from the true Owner; ^w for if there is no Cause, or one that is insufficient to transfer the Property (as if the Thing was only *lent* or *deposited* for safe Custody, or possessed by Tenants, &c.) no Prescription can follow upon it.

3. The Thing must be *capable* of Prescription; therefore there is no Prescription of Things exempted from common ^x Commerce, as of a Freeman, Things sacred and consecrated to God, or of those Things which were once lodged in the *Fiscus* or Exchequer. The ^y Prince's Domains, (called *Patrimoniale*, being the Estate of *Justinian* not as *Cesar*) are not liable to Prescription, nor the ^z Goods of Churches, Cities, Hospitals, nor ^a Things stolen, (for stolen Goods may be concealed till the Time of Prescription comes;)

Yet see the Law of England, if stolen Goods are sold in a Fair or Market. Dr. & Stud. lib. 1. cap. 25. 2 Inst. 713. 5 Rep. 83.

nor Goods of ^b Infants or Minors, nor of ^c Soldiers upon Expeditions, or of those that are ^d absent in the Affairs of the Commonwealth; for that Time of Absence shall be deducted from the Time prescribed; nor the Goods given to ^e Magistrates in Bribery, &c. And lastly, ^f those Things are not liable to Prescription which are prohibited to be alienated by last *Will* or *Testament*. ^g Hence it is that *Movable* Things are rarely *prescribed*; for some of these Incapacities frequently attend them.

4. Not only a just but a ^h continual Possession must support the Title by Prescription; which shall be presumed till the contrary appears. The Possession of ⁱ Tenants, Proxies, &c. continue the Possession for the true Proprietor not for themselves; for it is not necessary that the Possession should always remain in the same Person. An ^k honest Buyer may begin the Prescription in himself, laying

^d *Absentia ejus qui Reipublicæ causa abest neque ei neque alii damno esse debet. D. 50. 17. 140. Officium publicum nulli nec Damno nec compendio fit. D. 4. 60. 29.*

ing aside the Time acquired by a dishonest Seller, because he fairly paid a Price; but where the Thing comes *gratis*, as ¹ by Gift, or ¹ D. 44. 3. 5. Legacy, or Succession, if there is Fault or Injustice in the first Party, there does not seem so much Reason to continue the Prescription. I spake of the Faults in the *Person* possessing; for if there is an Incapacity in the *Thing* itself to be prescribed (as before, because either stolen or taken by Violence, &c.) the Prescription cannot be supported or continued over by any Means.

All *Interruptions* are *before* the Time of Prescription is fulfilled, and are either *Naturally* and in Fact, or *Civil* Interruptions and by Law. A ^m natural Interruption is when a *movable* Thing is taken ^m D. 41. 3. 5. from the Possessor, or an *immovable* Thing enter'd upon and seiz'd by another, or deserted by himself; or when an Alienation is made from Us, by one who was intrusted with the Possession in our Names. A *Civil* or *Legal* Interruption may be by *Citation* or other ^a Judicial Claim; sometimes by offering a Libel before the Judge, ^a C. 7. 40. 2. if the Defendant absconds, or is a Madman; more especially when Suit is contested, or Issue joined upon the Right and Sentence given by the Judge, ^o This Interruption concludes only the Parties in Suit; ^o D. 44. 3. 10. the *other* in Fact all Parties whatever. A Prescription may also ^p D. 41. 3. 5. *cease* for a Time without a total Interruption, by standing still and not gaining Ground; as in Time of great Sickness or War, where the Party is hindred from making his Claim; but if the Courts of Justice are open in the Time of Sickness or War, there is no Reason it should cease.

5. ^q Lawful Time is necessary to give a Right by Prescription; ^q I. 2. 6. pr. which is *three* Years for Things *movable* and corporeal, and *ten* Years for Things *immovable* and incorporeal, if the Persons pretending Right inhabit in the same Province. ^r But if they are so far ^r C. 7. 33. 12. absent from each other, as to live in several Provinces, then ^s twenty ^s C. 3. 31. 7. Years Prescription is necessary to gain an *Estate*. So much ^t Time ^t C. 3. 31. 7. is also absolutely required to bar *real* Actions, and *criminal* Accusations, for after that Time there seems to be a new Scene of Affairs, and it may not be of any Importance to the Publick to prosecute.

In this Computation of Time we do not reckon from Moment to Moment, or from Hour to Hour, but from Day to Day. ^u The ^u D. 44. 3. 15. first Moment of the last Day being computed as one whole Day in ^v D. 44. 7. 6. favourable Cases.

The Reason of this Difference in the Times of Prescription is evident, because to those that live at a Distance a longer Time ought to be allowed to make their Claims.

If the Persons have dwelling Places in several Provinces, they are reputed to be present in each; and if a Man hath no dwelling Place of his own, and neglects what belongs to him, that Person may be esteemed to be present every where, because he hath no fixed Station.

These are the common Prescriptions of Time, and take Place in all Things belonging to private Persons which are *capable* of Prescription, and when they are possessed *bona fide*.

But

^u In Usucapionibus non a momento ad momentum, sed Totum postremum diem computamus. D. 41. 3. 6. — In omnibus Temporalibus Actionibus nisi novissimus Totus ieds compleatur, non finit Obligationem. D. 44. 7. 6. [Vid. antea. pag. 108.]

^w C. 7. 39. 3 & 4. But there are other Prescriptions of longer Time, (*viz.*) ^w thirty or forty Years, by which even stolen Goods, and those obtained by Force may be prescribed by the Civil Law, having no Regard to the Justice or the Injustice of their first obtaining them; and this for the publick Quiet, which seems to justify the Lawfulness of it in Conscience.

^x c. fin. Ext. De Præscrip. But the ^x Canon Law does not approve of it, but directs the contrary.

^y C. 7. 35. 5. ^y Personal and mixt Actions continue regularly within thirty Years; and bare Possession for so long Time gives the Right; and though generally thirty Years is the Limit, yet sometimes by Reason of Privilege in the Thing or Person, or on some other particular Account, the Time is extended to ^z forty Years, and sometimes to an ^a hundred Years, as against the Roman Church; and sometimes Time ^b out of Mind is required, as in the Exercise of a Right which is not continually made use of, as the Right to draw Water, &c.

^c C. 7. 39. 3. The Prescription of thirty or forty Years concludes ^c Soldiers in actual War, Women, Persons absent, Minors but not Infants; tho' the former Prescriptions could not conclude them. An Action for ^d verbal Injuries is barr'd after one Year, as also ^e all popular Actions, ^{i. e.} those which are moved for the Benefit of the Publick. By ^f four Years Possession, the ^f Exchequer or the publick Treasure is secure against all Claims, and by four Years Possession is barred to seize forfeited Goods; and if the Exchequer sells or gives to a private Person, his Title upon the mere Delivery is unquestionable; but the injured Person has his Remedy against the Exchequer if he sues in Time. This was invented to encourage Men to purchase of the Publick, and not to fear their Power. It extends to the Emperor's Patrimonial and private Estate, and by a particular ^g Constitution the Empress hath the same Privilege.

^h D. 5. 3. 13. 9. This Prescription of the Exchequer was unknown to the ^h Ancients, condemned by the Canon Law, and is disapproved of every where by the Moderns, except in Holland and Savoy. (Groenweg. hic.) Every Country now hath its particular Custom in the Method of Prescribing, which runs generally for thirty Years, upon which Account this Title for the most Part is grown obsolete.

The strict Law of Prescriptions in all Cases, from the least Time to the greatest, hath been accurately collected by (Cujacius, who hath in a manner exhausted this Subject. (Cujac. de Diversis Temporum Præscriptionib.)

By the Common Law of England, the Time of Prescription is that Time whereof there is no Memory of Man or Record to the contrary, so that the Bona fides, or the Cause or Consideration of it cannot be inquired into. This is applicable to Customs and Usages, &c. V. p. 98. Yet in several Instances less Time is sufficient to prescribe, as a Year and a Day, six Months upon the Lapse of a Patron in not presenting to a Church, &c. 1 Inst. 114. b. 115. a. 254. b. 344. b. Dr. & Stud. lib. 2. c. 36.

But there is a Prescription too of a shorter Time, by Acts of Parliament in England, as of five Years after four Proclamations upon

upon a Fine (i. e. a judicial Transaction or Agreement) of Lands and Tenements duly acknowledged in a Court of Record, &c. (4 H. 7. 24. 35 Eliz. c. 2.) Two Years, or one Year, or shorter Time shall bar popular Actions by Informers, (31 Eliz. 5.) Writs or Actions are sometimes barr'd after sixty Years Possession, sometimes after fifty, forty or thirty. (32 H. 8. c. 2.) Some after twenty Years; some after six Years, or four Years, or two Years. (21 Jac. c. 16.) and by other Acts of Parliament, several Periods of Time are fixed greater or less, which are not so common in Practice as those already hinted at. Regularly no Man can prescribe against the King of England (1 Inst. 41. b.) or against an Act of Parliament, (1 Inst. 113. a.)

It has been made a Question among learned Writers, whether a Right may be gained by Prescription betwixt two Kings, or free Nations; or between a King and a free People; or between a King and the Subject of another Prince; or between two private Subjects of two several Kings. But setting aside the Civil Law, I do not see why Dominion by the Law of Nations may not be transferred by Possession, Time out of Mind, as being gotten upon the Supposal of a Dereliction by so many Years Possession; and because that otherwise Titles to Kingdoms, or Controversies concerning their Bounds, would never be at an End.

II. Donation or Gift generally and properly taken is without Doubt the Effect of the Law of Nations; but it is to be consider'd here in its improper Signification, as it is made either *Propter Nuptias*, by Reason of Marriage, or *Mortis causa* upon a Prospect of Death; for those are the Contrivance of the Civil and a positive Law.

^k Gifts are distinct from a Delivery, because they include *that* and the Cause of it; and had anciently a particular Form to make them effectual.

But before I speak of an improper Gift, the true Subject of this Place, it may not be amiss to say something of it in its proper and general Signification.

I. A Proper Gift, (or *Donatio inter vivos*, especially so call'd) is ^l when one out of mere Liberality bestows any thing upon another, there being no Law to force him to it. ^m Recompence (*munus*) is not comprehended under this Definition, nor ⁿ Honorary Payments for Kindnesses or Services done, or to be perform'd hereafter.

^o Gifts are not favoured in Law, being too often the Means of Corruption, or the Effects of Prodigality; therefore the Presumption is not for them, but strict Proof is required on the other Side to shew the Intention of the Owner. If that is done, even dishonest Gifts upon ^p lewd Women for the Use of their Bodies, are not void; for though they do ill in being lewd, there is no Pravity in receiving Gifts. Besides both the Man and the Woman are blameable; and one ought not to be reliev'd against the other. Yet the Constitution of An-

X x

toninus

^l Donari videtur quod nullo jure cogente conceditur. D. 50. 17. 82. Dat aliquis ea mente ut statim velit accipientis fieri, nec ullo casu ad se reverti. D. 39. 5. pr. Cui Jus est Donandi, eidem & vendendi Jus est. D. 50. 17. 163. Qui donare non potest, non potest donationis causa consentire. D. 50. 17. 165.

^m Munus est Donum, Onus & Officium. D. 50. 16. 80.

^q C. 5. 16. 2. *toninus* allowed Soldiers to recal their Presents, which through Flattery their *Concubines* obtain'd from them; ^q but this does not extend to Gifts made to *common* Women.

To the *Perfection* of a Gift, the *Consent* of the *Giver* (expressed in *Writing*, or *without* it,) and the *Consent* of *Him* to whom the Gift is made, is required; ^r for if he is either unwilling to accept, or ignorant of it, it is no Gift. ^s Anciently it was not perfect without *Stipulation*, or *actual* Delivery, and other Forms and *Solemnities*; which were some of the Reasons why Gifts in general are reckon'd here among the Modes of acquiring by the *Civil* Law. ^t C. 8. 54. 35. The Gift therefore may be perfect (*ex nudo Pacto*) ^t by bare *Consent* and *Agreement* before Delivery, to which the Law in this particular Case will force the Giver or his Heirs, if the Gift is expressed by Words of the Present Tense, and not in the Future, tho' the Person to whom the Gift is made was absent at the Time of the Agreement; for both Parties may act by ^u Proxy, or by Letter. ^u C. 8. 54. 13 & 20.

^w D. 50. 17. 28. ^x D. 24. 1. 22. ^w But no one is to be condemned to perform more than he is able. As it is an ^x *Agreement* to give, it might be reckon'd amongst the Obligations by Contract.

Nude Agreements are valid by the Canon Law, c. 66. quicunque. 12. qu. 2. c. 1 & 2. hoc Tit. and by Custom in other Nations beyond Sea. Groenw. de LL. Abrog. in Inst. Tit. 20. § 19. But by the Laws of England no Action lies upon such a bare Consent, Agreement, or Promise. Dr. & Stud. Dial. 2. c. 24.

^y D. 39. 5. 2. 6. Before the Gift is *accepted* the Giver may recal it; ^y and if the Giver dies before the Acceptance, there is such a Right vested in his Heir, that the Acceptance comes too late, ^z unless in the Case of Gifts to pious Uses. And if the Person to whom the Gift is made dies before Acceptance, ^a his Heir also cannot consent where the Gift is Personal; for an Union of Consent is requisite.

^b C. 2. 19. 11. ^b What is once delivered as a Gift cannot afterwards be recover'd as a Debt. The Proximity of Kindred between the two Persons, ^c D. 3. 5. 34. shall not always suffice to presume it ^c a Gift; but we ought to be guided by the Circumstances of it.

If the Gift exceeds the Value of 500 Crowns it must be publicly ^d C. 8. 54. 27. ^d Registered at the Time of the Gift made, that Men may not part with their Estates rashly, or pretend Gifts to defraud their Creditors.

^e D. 42. 8. 17. 1. If the Gift is made of the whole Estate, the Creditors may ^e revoke it, and discharge their Debts. But if the Value of the Gift is above

^f C. 8. 54. 35. 3. 500 *Aurei*, and not publicly registered, it may be ^f valid for 500 and void as to the rest. This Sum must be given at ^g *once* to bring it under the Necessity of being enter'd on Record, for the Gifts are

^g C. 8. 54. 34. 3. good without being registered if they were *several* and at different Times, though in the whole they amount to more than that Sum. Gifts made by the ^h Emperor, and to him are excepted:

ⁱ Nov. 52. 2. Yet by a ⁱ *Novel* Constitution of *Justinian*, the Gifts of the Emperor

^w *Qui ex Liberalitate conveniuntur, in id quod facere possunt, condemnandi. D. 50. 17. 28.*

^y *Non videntur data, quæ eo Tempore quo dantur, accipientis non fiunt. D. 50. 17. 167.*

peror to private Persons ought to pass under some publick Instrument subscribed by the Emperor and Witnesses; which was not formerly required. Neither are Gifts for the Redemption of ^k Cap-¹ C. 8. 54. 36. tives, nor Gifts made to ^l Soldiers by the *Magister Militum* for gallant ¹ C. 8. 54. 36. Exploits performed in War, nor ^m Money collected for repairing ¹ C. 8. 54. 36. demolished Houses, to be recorded. This is not to be extended to ² give a Privilege to other ^a pious Causes. ² C. 1. 2. 19.

Though the Canon Law seems to direct it.

In the Laws of England, Alienations by Bargain and Sale of an Inheritance or a Freehold are required to be registred or inrolled by 27. H. 8. c. 16. Also there is no Preference made of Gifts to pious Uses beyond other Gifts. Dr. & Stud. l. 2. cap. 24. But in France all Gifts of whatsoever Quantity or Nature must be registred. Groenweg. hic. Les Loix Civiles, &c. h. t. v. Book 3. ch. 6. in fin.

^p He that delivers a Thing by Mistake, may recal it, but if he ^p D. 50. 17. does it knowingly, it is a Gift. ^{53.}

The farther Requisites to the Validity and Perfection of Gifts are,

1. A Capacity in the Giver, ^q for old dotting Persons, Madmen, ^q C. 8. 54. 16. Prodigals and Minors are prohibited; also a ^r deaf and dumb Person ^r C. 6. 22. 10. by Nature, not by Chance or Disease; a ^s Husband to his Wife, ^s D. 24. 1 & 2. or a Wife to her Husband; lest the one through too much Fondness might be impoverished, and lest the Denial of such Gifts should occasion Discontents and Divorces. Yet these Gifts may be made to each other upon Prospect of ^t Death; for such are deferr'd till ^t D. 26. 2. 9. 2. they cease to be Man and Wife. The ^u Emperor and Empress have ^u C. 5. 16. 26. a particular Privilege, for they may give to each other. The Wife also cannot give away her ^v Dowry, no not with the Consent of ^v C. 8. 54. 21. her Husband, except in some particular Cases.

In the Laws of England a joint Consent is sufficient to alienate the Dowry of the Wife; 4 H. 7. c. 24. but She can't give or alienate any thing without his Consent. 1 Inst. 112. a.

^x Criminals condemned to Death cannot grant away their Estates ^x D. 36. 5. 15. after Sentence; though others date the Forfeiture from the Commission of the Crime.

2. A Capacity in the Receiver is requisite; for (as hath been said) Husband and Wife, &c. are incapable to ^y receive from each other. ^y D. 24. 1. 1. Also no one can give to himself; ^z for what is once mine cannot ^z be made more so; nor to a Madman, &c. nor a ^a Father to his Son ^a C. 8. 54. 17. under his Power, for whatever he gains upon the Father's Stock it is for the Father's Use. It is question'd farther, whether for this Reason even the Books which the Father gave the Son belong to him after the Father's Death, or the Son's Emancipation, though necessary to his Education. Such a Son under the Power of his Father also cannot give to his Father, unless he hath Goods of his own

^p Cujus per Errorem dati Repetitio est, ejus consulto dati Donatio est. D. 50. 17. 53.

^z Quod proprium est alicujus, amplius ejus fieri non potest. I. 2. 20. 10.

own distinct from the Father's Goods; for as hath been said before; by the *Roman Law* they are but one Person.

V. ante, Of a Person in its Civil Capacity, Father and Son. pag. 124, 125.

— 3. There must be a *Capacity* in the *Thing* to be given; wherefore Things that cease to be in Nature, Things sacred or appointed for publick Use, a Freeman, ^b and that which belongs to another, cannot be given; nor an Inheritance by the ^c presumptive Heir before the Testator is dead, for it is not yet an Inheritance; ^d neither can *all* the Goods present and *to come* of any Person (amongst those that are alive) be given away, ^e unless in some special Cases.

If there is a Capacity in the *Giver*, *Receiver*, and in *Things* to be given, all Things movable and immovable, corporeal and incorporeal, may be transferr'd by Gift, as *Actions* may be released ^f *gratis*, or assign'd over to another. Also future *Actions* may be transferr'd to Friends, Strangers, ^h absent Persons by Proxies, or by Letter, or to Persons unknown. Of which more hereafter under the Title *Of Actions*.

If these *Gifts* are once perfect, they are in their own Nature ⁱ irrevocable, ^k tho' the Giver pretends, that by these Gifts he hath defrauded his Creditors; for no one is to be suffered to take any Advantage by pleading his own Crime; neither are they to be made void even by the ^l Rescript of the *Emperor*. Yet for three Causes Gifts may be *revoked*.

^m 1st. Where the Gifts are ⁿ *inofficiosa*, and in such large Quantities that a Father, Son or Brother is not left that Share which the Law does allot him.

ⁿ 2^{dly}, For ⁿ *Ingratitude* against the Giver which may exert itself in five Instances, (*viz.*) if the Receiver hath grievously *defam'd* the Giver, or laid *violent Hands* on him, or *damnified* his Estate, or laid in wait to take away his *Life*, or lastly refused to fulfil the *Agreements* which were made at the Time of the *Gift*. The Donor himself must make these Complaints of Ingratitude; for if *he* is silent and dies, his Heir is for ever barr'd; and if the Receiver dies, his Heir cannot be prosecuted for it.

Some would add another Cause of Revocation, as where the Receiver denies Relief to the Giver, who is reduced to Poverty; which tho' it seems equitable and full of Humanity, yet because the Law is penal and restrain'd only to those five Instances; it scarce ought to be extended in Equity or upon a Parity of Reason.

^o The ^o *Gift* itself is only call'd back by Ingratitude, and not the mean Profits, for those might be the Product of his own Cost and Industry, except those Profits which arose since the Suit was commenced and contested. But if the Gift is sold or exchanged, or given away, it cannot be recall'd; for then an innocent Person may suffer for the Crime of the Receiver.

^p 3^{dly}, Gifts may be recall'd and revok'd, ^p if the Giver afterwards happens to have Children, because no one can be presumed to prefer Strangers before his own Offspring. This is so far thought reasonable, and as it were a Condition imply'd in the Gift, that

that under the Name of *Children* a one Child only is comprehended. If the Giver at the Time of the Gift had Children, or did consider while married or unmarried that possibly he might have Children, it is evident then that he was willing to prefer the Children of a Stranger before his own; therefore the Gift ought not to be wholly revoked by those Children that were born while the Giver himself was living; not after his Decease, except so far as it was *inofficio* ^{C. 3. 29. 5.} *sa.* What if the Father expressly renounced, and with an Oath, that he would not revoke the Gift, though Children should be born of him afterwards? ^{C. 8. 56. 8.} The Law seems to be made in Favour of the Children as well as of the Father; yet it will be dangerous to revoke such a Gift when the Father evidently and expressly design'd the contrary.

It must be understood that every Gift is not to be revok'd upon this last Reason, ^{Ibid.} but where the Giver parts with *all* his Estate, or a great Part of it. A great Part is said to be above half, but it is the safest Way to leave the Determination of that to the Judge.

These *Revocations* take place only upon Gifts, that purely proceed from *Liberality*, and not to those made upon *good Cause*, or ^{D. 39. 5. pr.} upon Condition, for those are not properly Gifts; nor to Gifts made upon *Prospect of Death*, ^{D. 36. 6. 16.} for those may be revoked by the Giver at any Time before his Death. What if a Gift is made upon Account of supposed Desert and Merit, and it afterwards appears that the Giver was deceived? It must be answer'd, that the Gift cannot be revoked; for it was made upon a *Cause*, and the Grantor was in Fault not to make better Enquiry, and had Power to dispose without any Cause or Reason at all. We must not call that *Liberality* which is only a Discharge of a publick or private *Trust*. The prudent Reasons to be Liberal are Charity and Hospitality.

By the Laws of England Gifts absolutely made are revocable on no Account. Personal Things may be given by Word only, unless it be made by a Corporation or Body Politick; for then it must be in Writing under Seal. All Gifts of Estates of Freehold or Leases above three Years, must be made in Writing. 29 Car. 2. cap. 3.

It is absurd to think that the Grantor is liable to secure a good Title, or to ^{D. 39. 5. 18.} warrant these sort of Gifts; though the Receiver doth lay out great Expences upon them, and though they are afterwards evicted. But if the Giver does this out of Design or Deceit, an Action does lie.

2. An *improper* Gift is either *propter nuptias* by Reason of Marriage, or *Mortis Causa* upon a Prospect of Death.

1. *Donatio propter Nuptias* (a Joynture) was formerly called ^{I. 2. 7. 3.} *ante Nuptias*, because it could be made only before Marriage. The Gifts which were made by the Suitor to his Spouse before Marriage, or by the Spouse to the Man, have this ^{C. 5. 3. 15.} Condition implied in them, that if Marriage did not ensue without the Fault of the Giver the Gift was to be returned. ^{C. 5. 3. 16.} If Death of either Party did Y y ensue

^a *Non est sine Liberis, cui vel unus Filius unave Filia est. D. 50. 16. 148.*

ensue *before* Marriage, and the Woman was the Giver, the whole was to be returned; if the Man was the *Donor* the whole was to be returned to him or his Heir, if he had not kissed the Woman; but if he had kissed her, then half only; for a Kiss was then looked upon to be a sort of Consummation, and the Woman esteemed immodest that suffered it on any other Account.

The contrary Custom of Saluting, seems to be derived from the Practice of the Primitive Christians, who observed it as a Mark of Peace and Charity.

These Gifts by Reason of Marriage were formerly (before the Constitution of *Constantine*) irrevocable, whether Marriage follow'd or not, as much as those which proceeded from mere Liberality, ^d unless there was an *express* Condition to return them.

The Gift *propter Nuptias* afterwards might be made and ^e increased during the Marriage, as the *Dos* or *Portion* given by the Father of the Woman or some of that Line, call'd ^f *Dos Profectitia*, or *that* brought by the Wife herself, or given to her by her Mother, or by some other, call'd *Dos Adventitia*, might be made and increased in the same Manner. This does not contradict the Decree of the Senate, which prohibited Gifts to be made between Husband and Wife; for the Intention of that Law is to bar such Gifts only as were made without any valuable *Cause*; but *this* is rather to be term'd a Requitall or Recompence.

The ^g Condition annexed to this Gift is, that as the *Portion* (by a Fiction of Law) is to remain with the Husband, so this Gift is to remain with the Wife. Yet she has not the growing Interest or Profits of it, as the Husband has of her *Portion*; for he alone is to undergo the extraordinary Charge which the Marriage does bring with it.

The ^h Interest that the Wife hath in this Gift, is no farther than to keep it as a Security that her *Portion* shall be return'd if the Marriage is dissolv'd; not but that all his Estate is liable to answer for it; but in this Method there is a more direct Security. If the Estate of the Husband consists in *Immovables*, it cannot be ⁱ alienated or mortgaged by the Husband, ^k even by the Consent of the Wife, *unless in Cases of Necessity*, ^l or unless another Estate is to be settled in lieu of it.

Vid. ante Book I. c. 2. p. 117.

^m This Settlement, as well as the *first* must be equal *in* value to the *Portion*, both in its Quantity and Quality; for the ⁿ Portions of Women are very much protected and favoured in Law for the Encouragement of them to enter into the State of Matrimony. ^o Upon this

^a In Ambiguis pro Dotibus respondere melius est. D. 50. 17. 85. Reipublicæ interest Mulieres Dotes salvas habere propter quas nubere possunt. D. 23. 3. 2.

^o Hæc verba, Cum commodum erit Dotis filiae meæ tibi erunt Aurei centum, accipienda sunt, Cum salva Dignitate mea potero. Cum potero Doti erunt Centum, Cum deducto ære alieno potero. D. 50. 16. 125.

this Account an Action lies for the Portion on a *bare* Promise after the Marriage is solemnized.

By the Laws of England all such Promises ought to be in Writing.
29 Car. 2. cap. 3.

The *¶* *Movables* of the Wife may be disposed of by the Husband at his own Pleasure, so that after the Marriage ceases the Portion be made good by other Things of the same Value. For if the Husband was restrained to alienate the movable Goods, many Inconveniences would arise, and many might be deceived that traded with him. Therefore the Portion ought to be *estimated*, and as the Husband is Proprietor, so he is the Debtor for it. D. 23. 3. 42.
C. 5. 12. 5.

If the Wife dies before the Husband, though Children are living of their Bodies, in Strictness of Law,

Otherwise in Practice.

the *Portion* returns to the Kindred of the *Wife*; for it was given to support the Charge of a married State, which is now dissolv'd, and not for the Education of the Children. *¶* But by Agreements and Marriage Articles which were usually drawn either *before* or *after* the Marriage; the Parties concern'd might settle the Portion of the Wife in another manner; and by that means it might remain with the Husband as the old Law directed, though there were no Children between them. D. 23. 3. 6.
D. 23. 4. 26. 2.
D. 23. 4. 1.

By the Law of England, if a Man taketh a Wife seized of an Inheritance in Fee-simple, or Fee-tail, and hath a Child by her born alive, if the Wife dies, the Husband shall hold the Land during his Life, and he's call'd a Tenant by the Courtesie of England, Lit. § 35. And thus it is in Scotland. Mackenzy's Inst. 2. Book. Tit. 9. p. 126. But by the Laws of Scotland, if either Husband or Wife die within a Year after the Marriage, if there was no living Child born of them, all Things done by Reason of the Marriage become void, and return to the same Condition they were in before the Marriage, Mackenzy's Instit. Ec. pag. 37. By the Law of England Chattels real, as Leases for Years, &c. are not given to the Husband absolutely by the inter-marriage, but conditionally if the Husband happen to survive her; but while he lives he hath Power to alienate them at his Pleasure. But movable Goods or Chattels Personal are all given absolutely to the Husband, by the Marriage; the Wife having a Property in nothing but her wearing Apparel. 1 Inst. 300. a. 351. a.

Note, That the Words Dos and Donatio propter Nuptias are retain'd to this Day; yet since a Community of Estate has been introduced between Husband and Wife, where there are no Marriage Articles, or that by the Customs of each particular Country, the whole Estate or Part of it remains to the Survivor, or that the Portion of the Wife and the Gifts of the Husband in lieu of it, are every where subject to the Direction and Regulation of the previous Agreements and Marriage Articles, the Roman Law hath but little Force on these Subjects, and hath been long out of use throughout Europe. Groenw. de Legibus Abrog. in Lib. 2. Instit. tit. 7. § 3.

By

By the common Law of England, Dos or Dower is the third part which the Woman hath of her Husband's Lands after his Decease, and is not taken for the Money or Land which the Wife bringeth in Marriage; for then it is call'd either Marriage Portion, or Land given in Marriage. 1 Inst. 31. a.

^r D. 39. 6. 2.
cum seqq.

2 Donatio ^r mortis causa is when for fear of Death, (upon thoughts of some present or future Danger) something is given; as when a Giver is sick, or going to Travel, or into the Wars, or when there is a Pestilence in the Neighbourhood, &c. This may also be barely upon the Consideration of the Frailty of Humane Nature. It must be expressed in the Gift that it is made for fear of Death, or by such Words that it may appear not to be an absolute or proper Gift:

^u D. 39. 6. 1.

^u For the Giver had rather live and retain it himself. This Gift may be delivered presently, to be returned if the Giver escapes the sup-

^w D. 39. 6. 29.
& 30.

^x D. 39. 6. 2.

posed Danger, or if he repents of the Grant, ^w or if the Person to whom the Gift was made dies before him, or ^x the delivery may be deferr'd till the Death of the Giver. But it must be made in the Presence of each other, or by Messenger or Letters, and accepted of by the Receiver. ^y These Gifts may be revoked at any time because the Giver has the principal regard to himself, and not to the Receiver, as in proper Gifts that are pure and absolute.

^y D. 39. 6. 27.
35. & 2.

^z I. 2. 7. 1.

These Gifts by reason of Death have the form of a Contract, but the effect of a Legacy, and are ^z almost of the same Nature with a Legacy, or Gift by Testament.

^a D. 39. 5. 1.

^a Those are also improper Gifts which are made for other good Causes, or upon Condition, or sub modo, (i. e.) with a certain Duty annexed to them.

Succession.

^b D. 50. 17. 62.

III. By Succession or Inheritance one may also gain a Title, and acquire by the Civil Law. Succession or Inheritance is a ^b right of succeeding into that Estate real or personal, which the deceased Person had at the time of his Death. Though at other times the word Inheritance signifies the Estate it self, and not only the Right of succeeding into it.

This Inheritance may come in Succession. 1. By Testament. 2. By Law when one dies without a Testament. 3. By the Bonorum possessio granted by the Prætor.

By Testament.

^c D. 28. 1. 1.

I. 2. 20. 24.

1. There is a Succession by Testament or Last Will.

Now a Testament is our voluntary deliberate and ^c just disposition, touching what we would have done concerning our Estates after Death, with the direct appointment of an Heir in that disposition.

From this Definition it may be inferred, that a Testament ought to be advisedly made by our selves and not by Proxy, and that it does

^d D. 29. 6. 3.

not ^d depend on the Will of another;

The Canon Law allows it to be committed to the disposal of another. c. cum tibi. 13. X. de Test.

That

^b Hereditas nihil aliud est quam Successio in universum Jus quod defunctus habuerit. D. 50. 17. 62.

^c Testamentum est Voluntatis nostræ iusta Sententia de eo quod quis post Mortem suam fieri velit. D. 28. 1. 1.

That the Testator be not led by *Fear, Fraud, Flattery*; that ^e D. 5. 2. 4. the Testament be not in any part against ^f Equity or Decency; that ^f D. 28. 7. 9. it be full and ^g perfect, with the appointment of an ^h Heir; and that ^g I. 2. 17. 7. it be not of any force till ⁱ after the Death of the Testator. ^h I. 2. 20. 34. ⁱ D. 39. 2. 19. & 27. Heb. ix. 16, 17.

In unfolding the nature of *Succession by Testament*, I shall make some general Remarks upon *Testaments, Testators, Heirs, Legacies* and *Codicils*.

Testaments or Last Wills were originally the contrivance of the Law of Nations, and are very ancient, being a Method of *Alienation* of Property to take effect after Death.

We read that if^k Abraham had died without Children, his Stew-^k Gen. xv. 2, ard Eliezer of Damascus, a Servant in his House, had been his Heir. ^{3, 4.}

The *Romans* were inform'd by their 12 Tables from *Greece*, how to leave their Estates by Testament; the *Greeks* were instructed by *Solon*.

Plutarchus in *Solone*.

But as they receive a certain *Form* from the *Roman Law*, they are reckoned amongst the Methods of acquiring by a *Positive Law*. Yet all Nations had not this Method of disposing of their Estates by Testament, especially in *writing*.

For Testaments were not in use amongst the Germans. Tacitus Lib. de moribus German.

Some maintain that *Lands, or an Immovable Estate* ought not to be given away by Testament at all; for by this means too great a share might come to one Man, which would create Disturbances in a Commonwealth, by the Envy of those that want their Share, and by the Pride of those that have too much. Also that if it were so, many Frauds and Circumventions of young and old Persons would be prevented, which the Publick ought to take care of; since a Nation may well subsist where their People have no such Power of disposing of their Estates from their own Kindred and Family. Others contend that the Liberty of Testaments ought to be supported; for it maintains the Paternal Power, directs Children to Obedience, makes others endeavour to please, and promotes good nature in Society: That it does encourage Industry, when the Proprietor has Power to transfer his Wealth to those who in his Opinion deserve it from him. Sometimes also Testaments may be absolutely necessary, as when the next of Kin are Foreigners, and incapable of succeeding, or when a Man hath only natural Children which cannot succeed by Law, and would be wholly unprovided.

By the Laws of England before the 32. H. 8. c. 1. Lands and Tenements in Fee simple could not be given away by Will or Testament, unless in some places by a particular Custom. (V. 32 H. 8. c. 1. & 34 & 35 H. 8. c. 5.) Neither can Lands or immovable Estates be given away by Testament at this Day amongst the Danes, Swedes or Poles. Vinnius in Com. lib. 2. tit. 10.

By the *ancient* Law there were three ways of making a Testament.

1. *Calatis Comitiis*, in the *Roman* Assemblies in times of Peace, when they met to make Laws or chuse Officers. 2. In *Procinctu*, in time of War, when they were about to engage the Enemy in Battel. 3. *Per Æs & Libram*, when the Testator did pass away his Estate by way of an imaginary Sale of it to that Person whom he appointed to be his Heir; who on the other side did pay a piece of Money to the Officer that held the Balance to be paid over to the Testator (in the presence of five Witnesses of fourteen Years of Age at least, and Citizens of *Rome*) in consideration of the said fictitious Sale.

^l I. 2. 10. 2.

^m I. 2. 10. 3.

To these *five* Witnesses the ^l *Prator* added *two* more, and all of them were to seal as well as subscribe, and then by the ^m later *Civil Law* (extracted from the *ancient* Civil Law, and the *Pratorian* Law) it was ordered, that Testaments should be made at one and the same time in the Presence of seven Witnesses especially required thereunto, who should subscribe their Names, and affix their Seals to the same. The ⁿ Testator was also to subscribe it, and if he could not write, then that defect was to be supplied by an eighth Subscriber in his Presence.

ⁿ C. 6. 23. 28.

1.

By the Civil Law a Testament is either *Solemn* and *Common* to all the Citizens of *Rome*, or *Unsolemn* and *Privileged*, belonging to some only. Both are either ^o *Written* or *Nuncupative*.

^o I. 2. 10. 14.

^p I. 2. 10. 4.

& 12.

In a *Solemn written* Testament it is requisite, 1. That the ^p Testator should write his own Will, or dictate the same to another to be written, upon any matter whether Parchment or Paper, &c. But the ^q Heir or Legatary was punishable if either of them pretended to write it. 2. That the Testator ^r subscribe his Testament, unless he wrote the whole himself. 3. ^s That there be seven Witnesses at the least, Citizens of *Rome*, of fourteen Years of Age, Males, (for Women were not permitted to be present at the *Roman* Assemblies,) not Criminous, not Bondmen, or under the Power or Family of the Testator; not the Heir, nor his Father or Mother, because of their presumed Affection toward him. Otherwise several of one Family may be Witnesses and *generally* Those that have power to make a Will themselves; but they must be especially *required* for that purpose, all assembled *together*, and must *see* the Testator, and *hear* him acknowledge and publish the same. But if a Bondman that is reputed to be free, is a Witness, or a Woman is present in Man's Clothes, their Acts ought to be esteemed as Valid. 4. ^t That all be done at one and the same time, no business intervening, but what is of Necessity. 5. ^u That all the Witnesses subscribe and seal the same with their own Seals, or with the Seal of another. But a ^w Notary must use his own Seal, because it is of publick Authority, and distinct from all other. If *some* of the Witnesses die before the Testator, the ^x Will may be valid, for their Subscription and their Seals may be proved after their Death, but if *all* the Witnesses die the Testament falls. *Qu.*

^q C. 9. 23. 3.

^r C. 6. 23. 28.

1.

^s I. 2. 10. 3.

& § 6, 7, 8, 9.

10.

^t C. 6. 23. 21.

& 28.

^u I. 2. 10. 5.

^w Nov. 73. c.

5. & 6.

^x D. 29. 3. 6.

If these *Solemnities* were omitted the Testament was invalid, and could not be supported even as a *Nuncupative* Will, if it did appear that the Testator had a design to express himself in *Writing*.

Hence hath arose a question in Conscience and natural Reason, Whether advantage may be taken against a Testament for want of a Solemnity

Solemnity required by Law, when it plainly appears to be the Testator's Mind that the Estate should pass according to the Declarations therein mentioned? Those that deny it proceed chiefly upon the Supposition that Testaments are the Effect of a natural Right: Others that maintain the Affirmative insist, That for Prevention of Frauds in Testaments, it is necessary to keep up the strict Solemnities prescribed by Law. But if an Heir has enter'd upon an Estate by Virtue of some Testament defective in the Solemnity, if he is satisfied that such was the Intent of the Testator, he is not bound to relinquish the Estate, if the Heir at Law, out of a Generosity of Mind, or through Negligence, will not make any Claim to it.

An *Unsolemn* or *Privileged* written Testament is that which may be valid notwithstanding all or some of the former Solemnities are omitted. Such is the Testament of the *Father* where his ^y Chil- ^y C. 6. 23. 21. dren are instituted Heirs; which may be valid as to them, if the Hand-writing of the Father is not denied, and though it is without ¹ Nov. 107. c. 1. any Witnesses at all. ² Such is a Testament which is acknowledged ² C. 6. 23. 19. before the Prince, or publicly *registered*. This may be good without any of the foregoing Solemnities. A Testament of a Rustick may be valid, though there are but ^a five Witnesses, where one may ^a C. 6. 23. 31. subscribe for the other, by Reason of the Presumption of Illiterature amongst them. A Testament made in the Time of a ^b Conta- ^b C. 6. 23. 8. gion or *Plague* is unsolemn and privileged; where one Witness may come to subscribe after the other, there being no Necessity that all the Witnesses should be present at once.

But above all a ^c *Military* Testament, or the Testament of a Sol- ^c D. 29. 1. pr. dier is more eminently favour'd and *privileged*, in regard of their unsettled Life, constant Dangers, and of their unskillfulness in Letters. He may die partly ^d *Testate*, and partly *Intestate*; for if he ^d D. 29. 1. 6. appoints an Heir of Part of his Estate, the Residue shall devolve on his Heir at Law.

He is not subject to the Subtilty of that Fiction, that the Testator cannot be represented in Part.

^e He may appoint Heirs till a certain Time, and from a certain ^e D. 29. 1. 19. Time. ^f He may die with more Wills than one. ^g He may pass ^f D. 29. 1. 19. by his Children without any Necessity of disinheriting them by ^g C. 6. 21. 9. Name. ^h *Strangers* (*i. e.* those that are not Citizens) and *Woman* ^h I. 2. 11. pr. may be Witnesses to his Will; and two Witnesses are sufficient, though they are not specially required, and though they do not subscribe and seal the Will in the Presence of the Testator. And indeed if there are no Witnesses at all, the Testament may be valid, so that the Intention of the Soldier is proved to have been expressed either by *Words* or *Writing*. ⁱ By *Writing* even in Blood ⁱ C. 6. 21. 15. upon his Scabbard or Shield, or in the Dust with his Sword, if he is at the Point of Death. This Privilege is extended only to Soldiers in the ^k Camp, or in the Garrisons upon the Frontiers. But ^k I. 2. 11. 3. some are of Opinion, that those also who lie in their Winter Quarters, and in Inland Garrisons upon Duty, ought to enjoy the same, because they ought to be in a Readiness for Marches and sudden Expeditions; but this is strongly opposed by the generality. ^l If a ^l I. 2. 11. 1. Soldier

Soldier says in common Conversation, that such a one shall be his Heir; this is rather to be look'd upon as an artful Way of pleasing, or the Effect of a sudden Transport, than a Design of making his Will. ^m But however, if a Soldier lives in his own House, or in other Places, where there is no Necessity of being in a Readiness for Expedition or any Fear of Danger, he does not enjoy the Privilege of being exempted from the usual Solemnities.

ⁿ I. 2. 11. 3. This *Privilege* is allowed the Testament of a Soldier till a full Year after he is disbanded; so that if he dies within that Year, the Testament made in the Time of War is yet valid as a Privileged Testament. But the Discharge must be with ^o Honour, or upon the Account of Sickness, not for Cowardice, or any Misdemeanour. ^p If the Testament is made before the War without the necessary Solemnities, yet if the Soldier in the Time of War adds to it, or alters any Particular in it, it shall enjoy that Privilege; for it seems now to be a new Testament.

^q c. Cum effect X. de Testamentis. ^r c. Cum relationum X. de Testamentis. ^s Deut. xvii. 16 & 19. 15. Matth. xviii. 16. ^t C. 6. 23. 21. 1. Observe from the Account of Military Privileged Wills, how the Strictness of the Old Roman Law was not observed by the Romans themselves in many Cases. The ^q Canon Law therefore with good Reason has reform'd this Nicety of Circumstantials, and hath reduced the Number of seven Witnesses in Testaments to three, (the Parish Priest being one) and in some Cases ^r to two Witnesses, returning again to the ^s Law of God, and the Law ^t of Nations, where two Witnesses are sufficient.

There is no Use of Solemn Testaments in England, but they are made with all Liberty and Freedom, according to the Jus Gentium, which requireth but two Witnesses. And if it is certain and undoubted that the Testament was written or subscribed with the Testator's own Hand, the Testimony of Witnesses is not at all necessary, but the Proof may be from several Circumstances; as that the Testator was heard to say that he had made his Testament; or if such Testament was found in the Testator's Custody amongst his other Writings, &c. (Swinburn of Testaments, 1 Part. § 10. 4 Part. § 25.) But Devises and Bequests of any Lands or Tenements must be in Writing signed by the Testator, or by some other Person in his Presence, and by his express Directions, and must be attested and subscribed in the Presence of the Testator by three Witnesses at the least, or else it is utterly void. (29 Car. 2. cap. 3.) In Holland the Testament is valid, without any Distinction between a movable or immovable Estate, or between Chattels and Lands, if it is made before seven Witnesses according to the Roman Solemnities; but Testaments are generally made there either before two Eschevins (Judges) and a Secretary, or before a Notary and two Witnesses, Men, not Women, Corv. Enchirid. Lib. 2. tit. 11. In the Empire, France, Spain, &c. Testaments made before a Notary and two Witnesses are good and valid; though the Testator and Witnesses neither seal nor subscribe. Groenw. de LL. Abrog. Lib. 2. Inst. tit. 10.

A Written Testament is what I have already described, and is that which at the Time of making thereof is committed to Writing. For if it is afterwards put into Writing for Memory sake, and for Proof, it is a ^u Nuncupative and not a Written Will. ^v Of a written

^u C. 6. 23. 26.

^v I. 2. 10. 13.

a written Will there may be many Copies executed for Security sake, but they must be exactly the same; and then they are all Originals. Amongst other Advantages which the Testator hath by a written Will, * he may conceal the Contents thereof from the Witnesses, which cannot be done in a Nuncupative. The † Heir cannot be oblig'd to open the Testament before the *ninth* Day after the Death of the Testator, and then it may be open'd by the Heir, or ‡ any others who have an Interest to see or hear it. ^{x C. 6. 23. 21. y Nov. 115. 5. z D. 29. 3. 4 & 7. a I. 2. 10. 13.}

A * *Nuncupative* Testament is when the Testator doth by Word of Mouth only declare his Will before *seven* Witnesses; and such a Will is of as great Force and Efficacy as any written Testament. *Nuncupative* Wills are more ancient than written Wills, being in use before Letters were invented. They seem to differ in nothing from written Wills, in respect of the † Solemnities required, except † C. 6. 23. 26. that they are not necessarily to be reduced to Writing, and that the Witnesses are not to subscribe and seal them; it being sufficient that the Witnesses see the Testator, and hear and understand him when he appoints his Heir.

If † Contradictions are directed in a Testament both Clauses are † D. 50. 17. void, and it is not of Moment to enquire whether the first or last † 188. Words in the Testament are of most Force.

But in the Laws of England it is said that the last Devise taketh place. 1 Instit. 112. b. In the Laws of England also no Nuncupative Will shall be good where the Estate exceeds thirty Pounds in Value, if it is not proved by the Oaths of three Witnesses at least; required to bear Witness by the Testator, nor unless such Nuncupative Will was made in the Time of the Testator's last Sickness, and in the House where he had been resident for ten Days, before the making of the Will; except he was surpriz'd with Sickness abroad, and died before he return'd to his own Dwelling. 29 Car. 2. c. 3. By the 4th and 5th of Queen Anne, c. 16. Such Witnesses shall be deemed good Witnesses as are allowed upon Trials at Common Law.

Testaments and Wills may be made void, by Law, or by the Office of the Judge.

By † Law, as by the Birth of a Son after the Will is made, for the † I. 2. 13. 1 & Son is Heir to the Father, unless disinherited upon a good Cause; † 2. or when the Grandson comes into the Place of the deceased Father, who was instituted Heir; or by *Cancelling* the Testament wittingly; († for when it was cancelled unwittingly, if it can be read, it may † D. 28. 4. 1. be supported) † or by making a *perfect* Will after the first; for the † I. 2. 17. 2. last is presumed to be done with most Deliberation. But a † Verbat † I. 2. 17. 7. Revocation is of no Force; and an imperfect Testament is void in itself.

By † the Office of the Judge Testaments may be made void, as † I. 2. 18. pri where the Testament is *Inofficious* and contrary to a natural Right. This happens when those Persons are *disinherited* or *passed by* in Silence, which ought to have been instituted Heirs. For upon

A a a

Complaint

† Ubi pugnancia in Testamento juberentur, neutrum Ratum est. D. 50. 17. 188.

Complaint to the Judge by him who is so *disinherited* or *passed by* in Silence, the Testament may be made void, and the Inheritance restored to him as if he had succeeded to an Intestate. This ⁱ Complaint is given to the Testator's Children without Distinction of Degree or Sex; and to the Parents (whether disinherited or passed by) against the Testaments of their Children; ^k and to Brothers and Sisters even of the Half Blood by the same Father, if a base Person is instituted Heir in their stead. The ^l Complaint may be brought at any Time within five Years after the instituted Heir has possessed himself of the Inheritance; and by the ^m latter Law it does only tend to the Removal of the Heir, not to the Destruction of any other Part of the Testament. This Action is taken away ⁿ if he that is disinherited may come to the Estate of the deceased any other Way, or ^o renounces his Title to it, or neglects it for five Years, or has any ^p Legacy given him in the Will, tho' never so small.

ⁱ I. 2. 18. 1.^k C. 3. 28. 27.^l D. 5. 2. 8. 17.^m D. 5. 2. 9.ⁿ C. 6. 28.Authent. ex
causa.^o I. 2. 18. 2.^p C. 3. 28. 34.^p I. 2. 18. 3.

Which I believe gave Occasion to the Practice amongst us to leave the Heir or Legatary a Shilling, or some small Piece of Money.

However this Complaint of an inofficious Testament, is unknown to us in England. Vide postea the Law of England, page 184.

2. Concerning *Testators*, it is to be known that by the Law of the *twelve* Tables a general ^q Liberty was given of making Testaments. ^r All (even married Women during their Marriage) were capable of it, that were not especially prohibited afterwards by Law. For some are prohibited.

^q D. 50. 16.

120.

^r D. 31. 1. 77.

24.

^s I. 2. 12. pr.

1. ^s In respect of their *State*, as Bondmen, Sons under the Power of the Father, because they are supposed to be one Person; unless they are *Soldiers*, and make their Wills of the *Peculium Castrense*.

This is obsolete every where but in Friezland. Vinnii Com. Lib. 2. Tit. 12.

^t I. 2. 12. 5.^u D. 28. 1. 12.^w D. 28. 1. 11.^x D. 35. 2. pr.^y C. 6. 59.

auth. omnes.

^z D. 28. 1. 15.

^t *Prisoners of War, during their Captivity*, for they are in the State of Bondage, ^u not if they are made Prisoners by Pirates or Robbers. ^w *Hostages* in War, for they are in the Place of Prisoners. ^x *Strangers*, i. e. those that are not Citizens of *Rome*, (for they were presumed to be Enemies) which Law was afterwards ^y repealed. ^z Such as were *doubtful* of their Estate, whether Free or Bond.

All this is out of Use.

^a D. 28. 1. 5.^b I. 2. 12. 1.^c D. 28. 1. 17.^d I. 2. 12. 2.

2. For a *Defect in Judgment*, as ^a *Children Males* under fourteen, and *Females* under twelve complete; but a Will made upon the last Day of the last Year after six at Night, shall be esteemed as if the Day were already expired: ^b *Madmen*, but if they make their Wills during a *Lucid Interval*, it is valid: ^c *Idiots*, and those of unsound Memory and Understanding; amongst whom may be reckoned a ^d *Prodigal* while he is interdicted the Management of his own Estate, but if the Testament is made before that Prohibition, it is good.

V. ante of Prodigals, page 102.

3. For

3. For ° a Defect in Body, as one born Deaf and Dumb, unless ° C. 6. 22. 10. he understands how to write. But a ° Blind Man may make his ° C. 6. 22. 8. Will Written or Nuncupative.

4. Criminous Persons are prohibited; as those guilty of § Treason, § C. 9. 8. 5. ° Apostates, ° Hereticks convict. Those that have contracted k ince- h C. 1. 7. 1. stuous Marriages, for they cannot give away any thing to the Chil- k C. 1. 57. 4. 5. dren of such incestuous Marriage, ° Libellers, m Self-Murtherers n, ° D. 28. 1. and all those condemned of such Capital Crimes, for which their 18. 1. Estates are to be confiscated. m C. 6. 22. 2. n D. 28. 1. 8. § 1. 2. 4.

And by the ° Canon Law, manifest Usurers, unless they first make restitution. ° c. Quaquam Usur. De Usuris in 6.

As to incestuous Marriages and Libellers, there is no such Prohibition in our Laws.

By the Laws of England Married Women cannot make a Testament of their Lands, no not to their own Husbands 34 & 35 Hen. 8. cap. 5. Nor of their Goods and Chattels, without the Licence of the Husband (except the Queen of England. 1 Instit. 133. a.) unless in one or two particular cases. Swinburn of Testaments, 2. par. § 9.

It has been an ancient and famous question, Whether Kings can dispose of their Kingdoms by Testament without the consent of the People? The Negative seems to be well grounded, because there is not only an Alienation of the Land but of the Subjects too, who if they are in a state of freedom, cannot without Absurdity be made liable to Sale or any other Alienation without their own agreement to it. This holds not only in Kingdoms given to Princes by the consent of the People, and in Kingdoms that are Hereditary and Successive, but even in those that first came by last Will and Testament, or were gotten by Conquest. For in the one the Followers of the Prince have a share in the Prize, and in the other the consent and submission of the People is presumed.

3. Concerning Heirs, it is to be observed that the P Appointment P I. 2. 20. 34. of an Heir is the very Foundation of the Testament; for it is the Nomination of a Successor to the deceased in his whole Estate. Therefore these Words, Let ° Lucius be my Heir, amounts to a ° D. 28. 5. 1. good Testament: And the Word ° Heirs extends to the Heirs of ° D. 50. 16. 70. Heirs for ever.

In many Places and Countries the Appointment of an Heir is not necessary in a Testament. And sometimes the Nomination of an Heir amounts to no more than a Gift by Legacy. Vinnii Com. Lib. 2. tit. 14. § 12.

All

° Si nemo subit Hæreditatem omnis vis Testamenti solvitur. D. 50. 17. 181.

° Qui per successionem quamvis longissimam defuncto Hæredes constituerunt, non minus Hæredes intelliguntur quam qui principaliter Hæredes existunt. D. 50. 17. 194.

Hæredis appellatio non solum ad proximum Hæredem sed ad ulteriores refertur. D. 50. 16. 65. Hæredis appellatione omnes significari successores credendum est, etsi verbis non sunt expressi. D. 50. 16. 170.

^s I. 2. 19. pr. All ^s Heirs are either *Necessarii*, or *Sui & Necessarii*, or *Extranei* (Strangers) which are neither of them.

^t I. 2. 19. 1. 1. A ^t Bondman instituted Heir was *Heres Necessarius*, and did necessarily act as such, whether he would or no, and had his Freedom of course for it. Those that died indebted used to take this method, that in some measure the infamy of Poverty might fall upon the Bondman, and that the Creditors might seize those Goods that seemed rather to be the Heir's than the Testator's.

^u I. 2. 13. 5. 2. All the ^u Children of the deceased under his Power while living, whether Male or Female, Children or Grand-Children, Born or Posthumous by the later Law, were the *Sui heredes* and *Necessarii*, or else to be disinherited by name upon some just reason^{*}; and it was not in their power (unless by the permission of the *Praetor*) to refuse the execution of that Office. This was thought reasonable, because they were under the power of the Deceased while living, and seem'd to be one and the same Person, and to continue the management of their own Estate.

By the Laws of England and Holland no one is forced to be Executor or Heir. Swinburn of Testaments, p. 6. § 2. Vinnii Comment. in Instit. Lib. 2. Tit. 19.

^x I. 2. 12. pr. ^x If they are (*præteriti*) passed by in silence by the Father, &c. the Will is void; if (*exheredati*) disinherited without cause, the Testament is *inofficious*: If with cause, it ought to be expressed in the Will. The *Justifiable* causes of disinheriting are fourteen. Some whereof are for striking the Parents, or cursing, or endeavouring to kill them, or for accusing them in Criminal Causes, unless on the behalf of the Prince; or for refusing to give Security for the Parent, that he may be discharged from Prison. Thus if the Son turns Stage-Player, or keeps Players Company without his Father's consent; if the Son is Heretical, &c. these are justifiable Causes. ^z But a Soldier by reason of his particular Privilege, or a Mother or Grandmother (because their Children are not under their Power) may pass by their Children in silence in their Testaments, and it amounts to a Disinherison as much as if they had been disinherited by name. ^a Yet by a later Law, if in the Mother's or Grandmother's Will they are passed by in silence without a just Cause, the Will may be set aside as *inofficious*.

^b Nov. 115. ^b There are eight Reasons almost of the same nature to justify Sons in disinheriting their Fathers, and but ^c three are reckoned sufficient amongst Brothers and Sisters. The ^d Complaint does not extend to Persons in a remoter degree.

^c Nov. 22. ^c 4. ^c 47. ^d C. 3. 28. 21 & 22. It seems just that the Causes of Disinheriting and Exheridation should be always expressed, and the Magistrate made Judge of them; that no room be left to Fancy, Passion, Neglect, Importunity, Authority, &c.

By the Laws of England the Liberty of the Testator is so large and ample (as by the ancient Roman Law) that tho' the Testator hath Children of his own lawfully begotten, yet he may appoint others to be his Executors, secretly omitting, or openly excluding and disinheriting

beriting them according to his Pleasure. Swinburn of Testaments, p. 5. § 1.

3. ^e *Strangers (Extranei)* are those who are neither *Bondmen*,^c I. 2. 19. 5. nor under the *Power* of the Testator, and yet may be instituted Heirs, or omitted at pleasure, and may act or not act as they think fit.

But as there are *incapacities* in a Testator, so there are incapacities which attend on some which are instituted Heirs. The ^f *Extranei* made Heirs must be capable at three several times, (*viz*) at the time of making the Will, in which they are instituted Heirs, at the time of the Death of the Testator, and at the time when he enters as Heir upon the Inheritance. ^g Apostates, ^h Hereticks, ⁱ Libellers convict, and unlawful Companies, cannot be Heirs. ^g C. 1. 7. 3. ^c I. 5. 4. 2. ^h D. 28. 1. 18. ⁱ C. 6. 24. 8.

By the English Laws Hereticks and Libellers may be Heirs and Executors; but according to the English Constitution even Lawful Companies cannot be Executors; for they cannot take the necessary Oath. Off. Exec. 25.

Nor by the Civil Law can the ^k Adulteress be Heiress in the Testament of her Adulterer, or *è contra*. Neither can the ^l Prince be instituted Heir to maintain a litigious Title. ^k D. 34. 9. 13. ^l I. 2. 17. 8.

^m If the Persons are *capable*, the Testator may appoint as many Heirs as he pleases, into equal or unequal parts, according to the Division made by the Law into *twelve* Parts, ⁿ or into any other Method as he shall direct. ^o All the Heirs make but one Person, and represent the Testator. ^p If one is nominated Heir of part, and no Heir is instituted as to the rest, the whole devolves or accrues to him; therefore no one (except a Soldier) can *die* testate and intestate. ^m I. 2. 14. 4. ⁿ I. 2. 14. 2. ^o D. 28. 5. 9. ^p I. 2. 14. 5. & 7.

By the English Laws it is otherwise, as in France and Holland. Swinb. p. 4. 171. Vinnii Com. in Lib. 2. tit. 14. § 9.

Note that the whole Inheritance was called *As*, and was like a Pound divided into twelve Parts which were call'd Ounces, for no number can be more conveniently divided into Parts; you must not therefore confound it with the word *As*, which signifies the *least part* of Brass Money. ^q If any parts are wanting, or remain undi-^q I. 2. 14. 8. posed, so much is *deducted* or *added* to every Heir.

This Institution of Heirs may be *Absolute* or *Conditional*, ^r but not *till* a certain time, or *from* a certain time, for the addition of the Day shall be void. ^r I. 2. 14. 9.

Otherwise by the Laws of England, France, and Holland. eodem.

And a Condition existing shall have relation from the beginning to the end, but the addition of a *certain* Day cannot be subject to such a Supposition without absurdity.

Tho' ^s one is not *disinherited* or *passed* by, yet after the Death of the Testator he may be set aside as *Unworthy*, tho' expressly instituted Heir, or (if there is no Testament,) from the Succession to an Intestate, and the Estate shall come to the Exchequer. ^s D. 34. 9. t. t. ^C 6. 35. t. t.

B b b

By

By the Laws of France with more Equity to the next in Succession
Loix Civiles, &c. 3 Tom. Lib. 1. tit. 1. § 3. Vide antea. p. 156.

Some of the Causes of *Unworthiness* to succeed are when the Heir (through neglect) was the occasion of the Testator's Death; great Enmity with the Testator continuing till Death; an attempt on the Testator's Honour and Reputation, or for not prosecuting the Authors of his Death, &c. For such Causes he shall refund what he hath gotten into his Possession after proof.

This is unknown in England.

But if they are found *worthy*, they continue Heirs by *express* Declaration of their Acceptance, or *tacitely* when by any Act they meddle with the Inheritance, and behave themselves as Heirs.^a They may have the benefit of nine Months granted unto them by the ordinary Magistrate, and of a whole Year by the Prince to deliberate and look over the Accounts of the Deceased, and to consider whether they shall accept of the Office or not, when the Creditors or those that would be Heirs to the Testator (if he had died Intestate) urge the acceptance.^w But this time of Deliberating seems now to be unnecessary, since the Method of making *Inventaries* hath been introduced by *Justinian*.^x For now they have the benefit of three Months to make an *Inventory* or particular Account of the Estate left by the Deceased, y calling to them a publick Notary the Creditors and Legatees, and all others that may be concern'd in the Appraisment, or in their stead three credible Witnesses at the least.^z The advantage of an Inventory is, that the Heir shall not be charged by Debts and Legacies beyond the Value of the Inventory, which he was liable to if an Inventory was not made.

In the Laws of England the Executor is charged with the Debts, according to the Value of the Goods only, tho' an Inventory is not made. Dr. & Stud. Dial. 1. cap. 19. *In France and Holland it is an especial Favour to be allowed the Benefit of an Inventory.* Vinnii Com. Lib. 2. tit. 19. § 5. num. 8.

^a Ibid.

^b C. 6. 30. 22. 4 & 5.

^a The Heir may deduct for himself a fourth part of the whole according to the *Lex Falcidia*, and ^b pay that Creditor which comes first: ^c For that the Goods of a deceased Person should be obliged to pay his Debts, is as old as Dominion it self.

The Lex Falcidia is unknown in England, and there Creditors are to be discharged according to a certain Order. Swinb. p. 6. § 16. *but the Executor ought not to pay any one his whole Legacy when there is not sufficient to pay the rest,* Idem part 3. § 17. *for it is not the same in the Payment of Legacies (as in the Payment of Debts, where one may be paid the whole, and another but a part or nothing,* for

^z Ex quâ personâ quis Lucrum capit ejus factum præstare debet. D. 50. 17. 149.

for the number of the Creditors may not appear as the number of the Legatees must evidently do.

The ^d Heir may pay himself those Charges which he has laid out ^{d C. 6. 30. 22.} as Heir, (*viz.*) the Funeral Expences, the Charge of Registering the ^{9.} Will and making the Inventory; and he must be allow'd those Claims or Actions which he had against the Deceased.

While the ^e Inventory is making, he ought not to be sued by Cre- ^{e C. 6. 30. 22.} ditors or Legatees. But as he may be forced at last to a Payment, ^{11.} if there are other Cases where he cannot be forced at all, because ^{f D. 33. 1. 7.} the Testator hath wholly relied upon his Honesty for the Perform-
ance; as when the Testator order'd him to erect a Monument in
Memory of him by a certain Time, &c.

^g If he has once acted as Heir he cannot afterwards renounce that ^{g C. 6. 31. 4.} Office, unless he is a Minor. And if he hath once renounced, he ^{& 6.} cannot afterwards be admitted.

*By the Laws of England where there are three Executors, and
one only refuseth, he may afterwards be admitted. Office of Execu-
tors, page 59.*

When the ^h Legatees or Creditors of the Deceased fear that the ^{h C. 7. 72. 2.} Heir may prove insolvent, they may procure a *Separation* of the
Goods of the Testator, that the Creditors of the Heir may not seize
them.

If the Heir ⁱ dies before *Acceptance*, the Right is not *transmitted* ^{i C. 6. 51. 5.} to his Heir. It is contrary in the Case of an Heir to an Intestate,
or of a Legatee.

*But in France Entry or Acceptance is not necessary to make a
Transmission in some Provinces. Les Loix Civiles, &c. 3 Tom.
lib. 3. tit. 1. § 10.*

If there are *many* Heirs instituted in a Testament, or one Thing
given to many Legataries, and one only will act and accept, ^{k the k D. 29. 2. 53.} the ^{1.} Parts of those that refuse or neglect (*jure accrescendi*;) accrue to
him that acts and not to the Heir at Law. ¹ And so it is in a Suc- ^{1 D. 38. 16.} cession by *Coheirs* to an Intestate. ^{9.}

*The Jus Accrescendi by Testament amongst Strangers proceeds
from positive Laws, and not from natural Justice. Whereas in a
Succession to an Intestate by Coheirs, or the next of Blood, if one re-
fuses, the Jus accrescendi in that Case happens according to the na-
tural Law.*

^m Before Inventories were invented by *Justinian*, the Office of an ^{m C. 6. 51. in} Heir was refused as dangerous and difficult, and therefore upon such ^{pr.} pr.
Fore-sight Substitutions were created.

Substitution is an Institution of a *second* or *third* Heir, &c. as,
Let *Lucius* be my Heir, but if *Lucius* will not, then let *Sempronius*
be my Heir, and if *Sempronius*, &c, ⁿ So that if the first accepts, ^{n D. 39. 2. 3.} the Substitutes cannot succeed.

o I. 2. 16. pr.
1 & 2.

It is either ° *Vulgar*, *Pupillar*, or *quasi Pupillar*.

1. *Vulgar* Substitution appears in those Instances just now given.

2. *Pupillar* is when a Father substitutes an Heir to his Children, living under his Power at the Time of his Death, disposing of his own Estate and theirs too, if the Children should refuse to accept the Inheritance, or if they die before the Age of Puberty, *i. e.* twelve in Females, and fourteen in Males; for then they can make a Will for themselves. Before that Time the Father and the Children were esteemed to be but one Person, and therefore in regard to the paternal Authority *One* Will or Testament serv'd for all of them.

p C. 6. 26. 9.

3. *Quasi pupillar*, or *Exemplary*, is where the Father or Mother do institute an Heir to their Children, Minors or not, if they are Lunatics, Ideots, interdicted *Prodigals*, deaf and dumb Persons. ^p The Parents ought first to institute the Children of the Lunatick, &c. to be Heirs, if he has any Children; and if not, then his Brothers and Sisters; and in Defect of these he may institute for them any other Person. This is not allow'd by reason of any paternal Power which they are invested with, but merely out of Pity, and as it is an Act of common Humanity.

The Pupillary or Quasi Pupillary Substitution was peculiar to the Romans, unknown in England and other Nations. Groen. de Legibus Abrog. Inst. h. t.

Observe throughout that the Civil Law calls him Heir, who succeeds into the whole Estate real and personal, without any Distinction. But by the Law of England and Scotland he only is Heir who succeedeth to the real Estate by Right of Blood. 1 Inst. 237. b. Mackenzy's Instit. of the Laws of Scotland. Lib. 2. Tit. 2. He that succeedeth by Will into the personal Estate or Goods is call'd Executor. But no Estate of Inheritance or for Life, is with us comprehended under the Words Goods and Chattels; neither can such an Estate descend to the Executor. 1 Inst. 118. b.

q D. 31. 1. 50.

A Substitution may be to q *Legataries* as well as to *Heirs*.

r I. 2. 2. 20. 1.

4. *Legacies* are a sort of r Gifts by Will or Testament to be deliver'd by the Heir.

s I. 2. 23. 1 & 2.

t C. 6. 43. 2.

If the Heir is desir'd to deliver over or transfer the Inheritance itself, or Part of it (as it is divided into twelve Parts) to another, that is not a Legacy but a s *Fidei Commissum*, or Gift in Trust for another: If it is of one particular Thing as of a Garment, &c. it is in the t Nature of a Legacy: These Trusts were first introduced in the Time of *Augustus*, for the sake of those that could not be instituted Heirs, as Strangers who were not Citizens of *Rome*, &c. by which Means in favour of Testaments the Gifts had their Effect; but till now the Execution depended on the Honesty of the Heir. A *Prætor* therefore is appointed to force the Heirs to act according to the Direction of the Testator. The direct Heir was call'd *Fiduciarius*, and the other *Hæres Fidei-Commissarius*; and u Actions were brought against each of them according to the Share of the Inheritance

u I. 2. 23. 4. 6. 7.

* Legatum est Donatio à defuncto relicta ab Hærede præstanda. I. 2. 2. 20. 1.

ance which was left them by the Testament. ^w And so far he to ^w C. 6. 49. 1. whom the Inheritance is given, was bound to indemnify the Heir upon that Account. ^x Also a Person dying intestate, might charge ^x I. 2. 23. 10. his Heirs at Law with such a Trust and to deliver the Inheritance over to another.

Since an Estate or any particular Thing hath been allow'd to pass from one to another, either by Words of Request, or by imperative Expressions, these Fidei-Commissary Substitutions seem to comprehend more in them than a Trust, and answer to those Grants in Tail and Remainder so common in England. In France they are call'd either Fidei-Commissa or Substitutions Fidei-Commissaries, or Substitutions gradual or simply Substitutions. Les Loix Civiles, &c. 3 Tom. Lib. 5. tit. 3. These Limitations are more express in the 159th Novell.

A ^y general Prohibition to alienate the Legacy is void, but if ^a D. 30. 1. 114. Reason is assign'd (*viz.*) that it may descend to his Children and ¹⁴ Posterity, it ought to be observ'd.

In England a Grant to one and the Heirs of his Body, &c. cannot be alienated. 13 Edw. 1. but by Fine, or by Fine and Recovery. 4 H. 7. 24. 32 H. 8. 36. 34 & 35 H. 8. 20. 14 Eliz. 8.

^z All Things may be given in Legacy, either those that exist at ^z I. 2. 20. 4. 7. present or in futurity. It matters not whether it is corporeal or incorporeal, so that they lie in Commerce.

A Legatary therefore is distinguished from the Heir, because he takes no Duty or Office upon himself. He cannot by his own Authority take his Legacy, but he must receive it from the ^a Heir and ^a I. 2. 20. 1. by his Consent. ^b Formerly there were four sorts of Legacies, and to ^b I. 2. 20. 2. every Kind certain solemn and formal Words assign'd; but by the later Law there is but one kind of Legacies, and which may be bequeathed by any Form of Words. ^c A Creditor may release his ^c I. 2. 20. 13. Debt by *Will*, and the Legacy is valid. The ^d Creditor also may ^d Ibid. charge his Heir not to sue his Debtor till such a Time. ^e On the ^e I. 2. 20. 14. contrary, if the Debtor gives no more to his Creditor than what he owes him, the Legacy is void. ^f The Creditor may also give his ^f D. 31. 88. 8. Debt to a third Person, and the Heir shall *transfer* his Right of ^f I. 2. 20. 21. Action to the Legatary.

Vid. Postea of Actions.

^g If a Legacy is lost, or perished without the fault of the Heir, ^g I. 2. 20. 16. the Legatary bears the Loss; but when a Quantity of any thing (as Corn or Money) is bequeathed, that cannot perish. ^h If any thing in ^h I. 2. 20. 22. general is given, as a House or Bondman, &c. not describing it more particularly, if there are several of the same kind belonging to the Testator, the Election may be given to the Legatary, if the Words of the Testator seem to direct it. ⁱ But in that case the Le- ⁱ D. 30. 1. 37. gatary shall not take the best to overcharge the Heir, nor the worst to injure himself. ^k And if the Legatary does not elect during Life, ^k C. 6. 43. 3. his Heir may do it. If there are many Legataries and they cannot ^l I. 2. 20. 22. agree in the Election, the choice shall be decided by Lot. In giving a ^l House generally, if the Testator had no House, there being ^l D. 30. 1. 71. great

great differences in Houses, it is *Ludicrous*, and it can have no effect. If a yearly Estate is left to a City, that every Year in that City a publick Shew should be made there in Memory of the Testator, which is contrary to the Laws of that City, ^m the Legacy ought to be converted to some other use which is lawful.

^m D. 33. 2. 16. An ⁿ *Error* in the proper Name or Sirname of the Legatary does not make the Legacy void, if it can be understood what Person was intended. But if there is a mistake in an ^o *Appellative* name, it is naught. As if when the Testator would give a *Garment*, he calls it by the Name of *Household Stuff*. Neither can a false ^p *Demonstration* or Description make void the Legacy; as when the Testator gives his Bondman *Stichus*, which he bought of *Titius*, whereas *Stichus* was given to him, or perhaps he bought him of some other. Neither shall a false ^q *Cause* added to a *Legacy* be prejudicial to the *Legatary*, because it is superfluous. As when the Testator says, I give this Ground to *Titius*, because he hath taken care of my Affairs, when indeed he neglected them. But if it had been added by way of a ^r *Condition*, the Condition must have been perform'd to make the Legacy good.

^r Ibid.

Vide ante, Of the Execution of an Humane Act, pag. 108.

For a Legacy may be left upon Conditions *precedent* or *subsequent*; *absolutely*, or at a certain *time*, ^s with the addition of a Day when it may be demanded, tho' it was due before. In this case if the Legatary dies before the Day, his Heirs shall claim it; but if it is to be *due* at a certain Day, and the Legatary dies before that Day, the Legacy is lost. Or ^t it may be left *sub Modo* with a Duty annexed to it. A Legacy upon Condition cannot be renounced ^u *before* it is due; and if it is renounced, it may notwithstanding be demanded when the Condition is fulfilled. ^v If a Legacy is given to him that first ascends the Capitol, or wins the Race, and two Persons come together, and it does not appear which came first, in equity the Legacy ought to be divided.

^x Legacies may be given to *Uncertain* Persons if the Testator's meaning may be found out; to ^y *Cities* and *Companies*, which could not be done formerly.

^x I. 2. 20. 25.
^y C. 6. 24.
12.

Vide The English Statute concerning Mortmaine 7 & 8 W. & M. c. 37.

^z I. 2. 20. 26. A Legacy may be given also to a ^z *Posthumous* Child.

Vide 10 & 11 W. 3. c. 16.

^a I. 2. 3. 4. *Pradial Services* may be given in Legacy. As when the ^a Testator orders the Heir to suffer the Legatary to go through his Ground, or that the Heir shall not build the Testator's House higher to the prejudice of his Neighbour.

In

^z *Qui mortui nascuntur neque nati neque procreati videntur, quia nunquam Liberi appellari potuerunt.* D. 50. 16. 129.

In a Legacy of ^b Wine, Vessels also are given to contain it.

^b D. 33. 6. 3.

^c *Pradium instructum*, an Estate *and* the Stock upon it being bequeathed, every thing upon it as Gold, Silver, Household Stuff, &c. passeth with it. But if ^d *Pradium cum Instrumento*, an Estate with a Stock, is given, nothing passes but what is necessary to the manuring or support of it. ^e If the Estate is alienated before the Death of the Testator in the last case, the Stock does not go to the Legatary, because it was given as an *Accessory* to the Estate; but if the Stock had been given *principally*, as it is worded in the first Instance, an Estate *and* the Stock; the Stock might be taken without the Estate.

^c D. 33. 7.

^d D. 33. 7.

^e D. 33. 7.

^f D. 33. 7.

^g D. 33. 7.

^h D. 33. 7.

ⁱ D. 33. 7.

^j D. 33. 7.

In a Legacy of ^f *Household Stuff* all inanimate movable Things, of common use in the Family, either of Necessity or Pleasure (which are not of another kind, as Books, Money, &c.) are comprehended. If Household Goods in ^g general are given, and afterwards some few are added, they pass under the general name; ^h otherwise if a great part are alter'd.

^f D. 33. 10.

^g D. 33. 7.

^h D. 33. 7.

ⁱ D. 33. 7.

^j D. 33. 7.

^k D. 33. 7.

If a *Flock* of Sheep is given in Legacy, and the Flock is reduced to one upon the Death of the Testator, that ⁱ one may be claimed; as also if the Flock does increase, the Legatary shall have the Benefit of it. So if ^k a House is given, tho' great Additions are made to the House after the Testament is made, the Legatary hath a right to them.

ⁱ I. 2. 20. 18.

^k I. 2. 20. 19.

In the word ^l *Garment* (*Vestis*) Hats and Shoes, &c. are not contain'd.

^l D. 34. 2. 25.

^m D. 34. 1. 6.

^m *Alimentum*, Maintenance, comprehends Food, Cloathing, a Dwelling, Bedding, Education, ⁿ *Phisick*, &c. but in ^o Contracts the word is to be taken in a stricter Signification. If the ^p Character of the Legatary requires it, Servants and Horses may be allowed him. If the Legacy is absolute, it is due upon the Death of the Testator, not from the Time that the Heir enters upon the Inheritance; for he may be guilty of a fraudulent Delay to deceive him of it. And if the Legatary dies after the Testator, he *transmits* his Right to his Heir.

ⁿ D. 34. 1. 6.

^o D. 50. 16.

^p D. 43. & 44.

^q D. 2. 15. 8.

^r D. 34. 1.

^s D. 27. 2. 4.

Legacies may *cease* either by an *express* Revocation, or *tacitly* by some Act from which the intention of the Testator may be collected: ^q As if the Testator gives away that Legacy in his Life time, tho' he afterwards redeem it. Thus ^r if a Legatary dies before the Testator; for the regard was to his Person only, and not to his Heirs; or ^s where the Legatary comes to the Legacy *gratis* by some other means. The ^t Legacy also *ceases* if the Legatary kills or wounds the Testator; or if there has been great Enmity between them without reconciliation, it shall be taken away from him as *Unworthy* of it. [*Vide antea pag. 186.*]

^q D. 36. 2. 5.

^r I. 2. 21. pr.

^s D. 34. 4. 15.

^t C. 6. 51. 3.

^u I. 2. 20. 6.

^v D. 34. 4. 3.

^w I. 2. 22. 3.

Sometimes they cease in *part* only by the *Lex Falcidia*, which is a Plebiscite, by which the ^u Testator is prohibited to give away above *three* parts in four; for he must of necessity leave the *fourth* part to the Heir, ^w after the Debts and the Funeral Expences are deducted. If he doth otherwise, the Heir may retain the *fourth* part by virtue of this Law, or sue for it if the Legataries have got possession. This was enacted, because Heirs shall not refuse to act when the Testament would be of no advantage to them.

^u I. 2. 22. pr.

^w I. 2. 22. 3.

This Law hath no force amongst us in England.

This

^x I. 2. 23. 5. The *Hæres Fiduciarius*, ^x or *Heir in Trust*, also had this advantage by the *Senatus-Conf. Trebel.* as being founded on the same Reasons.

^y Nov. 131. But it does not take place in *Legacies to pious or charitable Uses*, or when the *Heir* ^z *willingly and knowingly* pays every one his whole Legacy.

^a I. 2. 25. 1. 5. ^a A *Codicil* (a *Codice* a Book or Writing) is the *last solemn Will of one that dies Testate, or Intestate* ^b *without the appointment of an Heir.* *Testate*, when he that made his Codicil hath either before or afterwards made his Testament, on which that Codicil depends or refers to it. ^c It is valid, tho' not confirm'd in the Testament. *Intestate*, when one leaves behind him only a Codicil *without* a Testament wherein he gives Legacies only to be paid by the Heir at Law, and not by any Heir instituted by Testament.

^d I. 2. 25. pr. *Codicils* first came in use in the time of ^d *Augustus* as advantageous to the *Roman Citizens*, who perhaps surprized with Sickness, or in foreign Countries could not conveniently find seven Witnesses who were Citizens of *Rome*, to be Witnesses to their Testaments, and therefore were under an impossibility of observing the other necessary Solemnities. A Codicil may therefore be said to be a *Last Will* but not a *Testament*.

^e C. 6. 36. 8. A Codicil as well as a Testament may be either ^e *Written* or *Nuncupative*, though the word *Codicil* seems to import a Writing, however a *Testament* and a *Codicil* differ. 1. Because ^f a Testament requires many Solemnities, a Codicil scarce any, only the subscription of five Witnesses at one time, though accidentally present, and not especially required thereunto, and though of the Female Sex. 2.

^g I. 2. 25. 2. The *Institution* of an Heir is ^g necessary in a Testament, but in a Codicil an Heir cannot be instituted directly; though by Codicil it may be declared that an Heir already instituted by Testament is only Trustee for another; neither can an Heir be *disinherited* by Codicil who was appointed by a Testament, nor be made conditional who was before absolutely instituted. 3. ^h No one can leave behind him two Testaments, but he may leave many Codicils, and ⁱ C. 6. 36. 3. all shall be valid, ⁱ unless they are contrary one to the other; because by Testaments the whole Inheritance is conveyed which can be granted but once, but by Codicil several particular Legacies only are given.

^k C. 36. 8. 1. Though the Law of Testaments and Codicils are distinct, yet it often happens that an ^k imperfect Testament may be supported as a Codicil, when there is the usual Clause in it, or the like, *viz. If this my Testament is not valid as a Testament, my desire is that it should be taken for a Codicil.*

In the Laws of England there is no difference between a Codicil and a Testament, unless because a Codicil is made without the nomination of an Executor. And by Custom they are confounded in other Nations. Groenw. de Legibus Abrog. in Inst. 2. tit. 21. § 34.

These Rules ought to be observed farther concerning Testaments.

^l D. 28. 1. 2. ^l He that makes a Will must be of sound Mind and Memory.

If

¹ *In eo qui Testatur ejus temporis, quo Testamentum facit, Integritas mentis non sanitas corporis exigenda est.* D. 28. 1. 2.

- ^m If a Testament is valid at the beginning, a subsequent Defect in the Testator cannot make it void. ^m D. 50. 17. 85. 1.
- ⁿ The Will of the Testator is the Law in a Testament. ⁿ D. 28. 1. 1.
- ^o The last Will of a Man is alterable and ambulatory till Death. ^o D. 34. 4. 4.
- ^p Men are apt to think their Estates larger than they really are. ^p I. 1. 6. 3.
- ^q Let those Expressions which have no Sense be rejected as if never inserted, but let others have their due force. ^q D. 34. 8. 2.
- ^r Those Clauses which are contrary to Law and good Manners can have no effect. ^r D. 28. 8. 15.
- ^s Ambiguous Expressions ought to be judged of by Circumstances and Probability of the Testator's meaning. ^s D. 34. 5. 24.
- ^t One may recede from the Signification of Words, if it is manifest that the Testator did not design what is expressed. ^t D. 30. 1. 4.
- ^u Words ought to be taken according to the common Way of speaking. ^u D. 33. 10. 7. 2.
- ^w Unreasonable or impertinent Desires of Testators about their Funerals, &c. ought to be neglected; for they ought to be managed according to their Estate and Character. ^w D. 11. 7. 14. 6 & 11. 7. 12. 5.
- ^x That Clause in a Will is void, which orders that the Testament shall not be expounded by the Laws. ^x D. 30. 1. 55.
- ^y Kind Constructions ought to be made upon Legacies given in a Testament. ^y D. 50. 17. 12.
- ^z Those are Heirs who succeed in the whole Estate of the Deceased. ^z D. 50. 17. 128. 1.
- ^a The Heir has the same Right as the Testator had while alive. ^a D. 50. 17. 59.
- ^b He that enters as Heir at any time has a Right to all Profits and Advantages from the Death of the Deceased. ^b D. 50. 17. 137.

^c In

- ^m Non est novum ut quæ semel utiliter constituta sunt durent, licet ille casus extiterit, à quo initium capere non potuerunt. D. 50. 17. 85. 1. Omnia quæ ex Testamento proficiuntur ita statim eventus capiunt, si initium quoque sine vitio ceperit. D. 50. 17. 202.
- ⁿ Voluntas facit quod in Testamento scriptum valet. D. 30. 1. 12. 3.
- ^o Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum. D. 34. 4. 4.
- ^p Sæpe de Facultatibus suis amplius quam in iis est sperant Homines. I. 1. 6. 3.
- ^q Quæ in Testamento scripta essent, neque intelligerentur quid significarent, ea perinde sunt ac si scripta non essent. D. 34. 8. 2.
- ^r Quæ facta lædunt pietatem, existimationem, verecundiam nostram, & contra bonos mores fiunt, nec facere nos posse credendum est. D. 28. 8. 15.
- ^s Cum in Testamento ambigue aut etiam perperam scriptum est, benigne interpretari & secundum id quod credibile est cogitatum, credendum est. D. 34. 5. 24.
- ^t Non aliter à significatione verborum recedi oportet quam cum manifestum est aliud sensisse Testatorem. D. 30. 1. 4.
- ^u Non ex Opinionibus singulorum, sed ex communi usu, nomina exaudiri debent. D. 33. 10. 7. 2.
- ^w Ineptæ voluntates Defunctorum circa Sepulturam non valent. D. 11. 7. 14. 6. Sumptus Funeris pro facultatibus & dignitate æstimandi. D. 11. 7. 12. 5.
- ^x Nemo potest in Testamento suo cavere ne Leges in suo Testamento locum habeant. D. 30. 1. 55.
- ^y In Testamentis plenius voluntates Testantium interpretantur. D. 50. 17. 12. Publicè expedit suprema Hominum Judicia exitum habere. D. 29. 3. 5.
- ^z Hi qui in universum Jus succedunt, Hæredis loco habentur. D. 50. 17. 128. 1.
- ^a Hæredem ejusdem potestatis Jurisque esse, cujus fuit Defunctus constat. D. 50. 17. 59. Non debeo meliõs conditionis esse quam aëtor meus, à quo jus in me transit. D. 50. 17. 175. 1. Qui in Jus Dominiumve alterius succedit jure ejus uti debet. D. 50. 17. 177.
- ^b Omnis Hæreditas quamvis postea adeatur, tamen cum tempore mortis continuatur. D. 50. 17. 137. Omnia ferè Jura Hæredum perinde habentur ac si continuò sub tempus mortis Hæredes extitissent. D. 50. 17. 193.

- ^e D. 30. 1. 39. ^e In doubtful Expressions the Heir ought to be favoured more than a Legatary. For the Heir is in the Nature of a Debtor, and the Legatary of a Creditor.
- ^d D. 50. 17. 127. ^d If any thing came to the Heir by the Fraud of the Deceased for a Moment only, he is responsible for it.
- ^e D. 50. 17. 157. 2. ^e In Contracts the Heir is answerable for the Fraud of the Deceased, where there is a Covenant to affect him; though the Profits or Advantages gain'd by the Fraud did not descend to him, an Amends being to be made out of the other Parts of the Estate.
- ^f D. 50. 17. 44. ^f But the Heir shall be answerable for the Deceit of the Deceased no further than the whole Estate left him does extend, but for his own Fraud to the full Damage.
- ^g D. 50. 17. 91. ^g He that claims by a double Title to an Estate by Succession, may renounce his Title by Testament, and depend on his Title as Heir to the Intestate.
- ^h D. 50. 17. 42. ^h An Heir may be justly ignorant of the Debts of the Testator or Intestate, and therefore ought not to be condemned in the Interests or Costs of Suit.
- ⁱ C. 5. 14. 5. ⁱ This is the Method and Law of succeeding by *Testament*, *Solemn* and *Common*, or *Unsolemn* and *Privileged*; both which, as has been said, are either *Written* or *Nuncupative*. Concerning which Way of Succession if any previous ¹ Contract or Bargain is made with any one, *viz.* *That he shall be your Heir*, this Contract is regularly void; because it seems to be contrary to the natural Love that every one ought to have for his own Kindred; and because such Contracts may be a Temptation to destroy that Person whose Estate is expected.
- ^j D. 28. 6. 2. 2.

Yet by Custom the Practice is otherwise in England, and in most Parts of Europe. Les Loix Civiles dans Leur ordre Naturel, Tom. 3. Preface, § 10. Vide ante page 180, 181, 184.

- By Succession to an Intestate. 2. ^k Succession by Law is where for want of an Heir appointed by Testament, the Law casts the Estate upon the ¹ next Heir of the Intestate: ^m Supposing that it was the Intent of the Deceased that his Estate should pass in that Method. It ought to be favoured more than a Testament to *Strangers*.
- ⁿ I. 3. 1. pr.

If

^c *Hæredi magis parcendum est.* D. 31. 1. 47.

^d *Cum Prætor in Hæredem dat Actionem quatenus ad eum pervenit, sufficit si vel momento ad eum pervenit ex dolo defuncti.* D. 50. 17. 127.

^e *In contractibus Successores ex Dolo eorum quibus successerunt non tantum in id quod pervenit, verum etiam in solidum tenentur, hoc est, unusquisque pro ea parte qua Hæres est.* D. 50. 17. 157. 2. *In contractibus quibus Doli præstatio vel bona fides inest, Hæres in solidum tenetur.* D. 50. 17. 152.

^f *Toties in Hæredem datur actionem de eo quod ad eum pervenit, quoties ex Dolo defuncti convenitur; non quoties ex suo.* D. 50. 17. 44.

^g *Quoties duplici Jure defertur alicui successio, repudiato novo Jure, quod ante defertur, supererit vetus.* D. 50. 17. 91.

^h *Qui in alterius locum succedunt, Justam habent ignorantie causam, an id quod peteretur deberetur.* D. 50. 17. 42.

ⁱ *Successio ab intestato est Successio legitima quæ deficiente Testamento defertur illis quibus Natura & Leges deferri voluit.*

^j *Proximi appellatione etiam illo continetur qui solus est.* D. 50. 16. 155.

If we enquire into its Original, it proceeds from the Law of Nature, because our Estates (when we die) ought to devolve upon our Children or next of Kin of course.

In this Succession by Law no Distinction is made in the Descent of a movable Estate or Goods, or an immovable Estate or Lands, as we do in England.

The Law, with relation to this Subject, anciently was very various and perplexed; but now by the *Novel* Constitutions it is settled and made plain. ^a This Succession is either in *Capita* or *Stirpes*. ^{n I. 3. 1. 6.}

A Succession in *Capita* is when the Inheritance is to be divided according to the Number of Persons which are to succeed; as the Inheritance of the Father into *four* Parts amongst his *four* Sons.

A Succession in *Stirpes* is when by a Fiction of Law a Family comes by Representation into the Place of the Person Deceased, and doth divide that Share amongst themselves, which he himself would have received if he had been living. As if one of the four Sons had died before the Father and left Children behind him, those Children should have *represented* their Father, and have had his Part, *viz.* a fourth Part amongst them *all*.

^o Succession by Law is either in the *Descending* Line, *Ascending* Line, or the *Collateral* Line. ^{o Nov. 118. præf.}

In the *Descending* Line, if the Parent dies (Father or Mother) all the Children *Male* or *Female*, Emancipated, or not Emancipated, by the first or second Marriage, born in lawful Matrimony, do succeed equally into all the Estate, whether real or personal. ^{p Nov. 118. c. 1. Nov. 22. c. 29.}

The Males first of all by the Divine Law, Num. xxvii. 8, 9, 10, 11.

To this Male Succession St. Paul alludes when he said, If thou be a Son thou art also the Heir, &c. Gal. iv. 7. But the eldest Son had a double Portion, Deut. xxi. 17.

This Descent is to all equally in equal Degree, for Prevention of Envy and Dissentions, which in all likelihood will happen when one is preferr'd before the other. But this Policy suits best with ordinary Families, for when it is for the Advantage of the Publick to preserve Kingdoms or Dignities, it may be reasonable to prefer the eldest Son.

A ^a *Posthumous* Child hath also his Share. A *natural* Child of a Concubine was not *incapable* to succeed, if there was a ^r subsequent Marriage, or a Legitimation in Court, or the *Rescript* of the Emperor to purge the Defect. ^{r Nov. 8. c. 28. & 9.} But a natural born Child may succeed ^{s C. 6. 57. 5.} in the Estate of the *Mother* with her lawful Children; for the Mother is sure and certain. And if the Father had neither lawful Wife nor Child, ^{t Nov. 89. c. 11. 4.} then the Natural born Child and the Mother of it might succeed to a sixth Part of the Father's Inheritance. ^{u Nov. 89. 15.} *Bastards* begotten in Adultery or Incest, are wholly incapable to succeed in the Father's or the Mother's Estate. Neither can they so much as claim a *Maintenance* from them by the *Civil* Law.

Though

Though the Canon Law is more merciful, and appoints a Maintenance for them, thinking it inhuman to starve those who are not concern'd in the Commission of the Crime, c. cum haberet. Extrav. De eo qui duxit in Matrimon.

By the Custom of England, the Child that is born before Matrimony is a Bastard, and shall not inherit. Dr. & Stud. Dial. 1. c. 7.

^w Nov. 118.
c. 1.

^w If there are no Children, the nearest Degree in a lineal Descent succeeds; always allowing the remoter Degree *in infinitum*, the Right of Representation, i. e. of coming into the Right and Place of another, and of succeeding in *Stirpes* in the descending Line.

^x D. 34. 5. 9.
1.
D. 34. 5. 22
& 23.

If Children die together with the Parent, so that it cannot be distinguished which died first, as in a Shipwreck, it is to be presum'd that the ^x Children liv'd longest, unless they were Infants and very young. It seems natural that the Estate should first descend, because the Parents are the Authors of the Being of their Descendants, and under an Obligation to provide for them; by which Means the Memory also of the Deceased Person is longer preserv'd.

In Sweden Estates as well acquired as inherited, descend to the Children in certain Portions: Of which a Son has two and a Daughter has one Part. Account of Sweden, cap. 3.

By the Custom of England the eldest Son is only Heir to his Ancestor, and if there be no Sons but Daughters, then all the Daughters shall be Heirs. And so it is of Sisters and other Kinswomen. If there be neither Son, Daughter, Brother or Sister, then shall the Inheritance descend to the next of the whole Blood, Kinsmen or Kinswomen, of him that had the Inheritance in infinitum. Dr. & Stud. Dial. 1. c. 7. Lit. 2. 3. &c. 1 Inst. 10. b. 18. b.

It is common in France for the Women (endow'd upon Marriage) to renounce all Right to Succession in favour of the Males. Loix Civiles, &c. 3 Tom. Tit. 5. § 2. Which doth bind their Children; but this Renunciation is not allow'd by the Civil Law.

^y D. 28. 16.
16.
C. 6. 20. 3.
^z Nov. 118.
c. 2.

2. ^y The *Ascending* Line succeeds when the *Descending* Line is at an end. 1. The Father and Mother equally. 2. After the Death of both Father and Mother, the rest according to the ^z Proximity of their Degrees both of the Father's and Mother's Side, no Consideration being to be had, whether the Estate came first by the Father's Side or Mother's Side.

Otherwise in France, for there Paterna Paternis, Materna Maternis. Loix Civiles, &c. 3 Tom. pref. § 4.

But the nearest Person in the ascending Line excludes him that is more remote, because no Right of Representation is allow'd amongst Ascendants; for it looks preposterous that the Grandfather should represent his Son, &c. ^a Yet note, that the Brothers and Sisters

^a Nov. 127.
c. 1.

^a *Si quis prægnantem uxorem reliquit, non videtur sine Liberis decessisse. D. 50. 17. 187. Posthumi pro jam Natis habentur. I. 1. 13. 4. D. 50. 16. 153.*

Sisters of the *whole* Blood to the Deceased are admitted with the next Ascendants; and if there are Brother's and Sister's Children, the Right of Representation and of succeeding into their Father's or Mother's Share, with the Ascendant in the right Line is allow'd them. And in general the Parents may succeed those Children which might have succeeded them, if the Parents had dy'd first.

It seems just that the Father and Mother should succeed when the descending Line is spent, because either the Estate came from them, or Part of it; or Gratitude for Education may direct it; or else they may have a Pretence to it as a Recompence and Comfort for the Loss of their Off-spring. Though others pronounce it inconvenient, because the surviving Father or Mother by second Marriages often carry the Estate into other Families. And for this Reason a lineal Ascent is prohibited in France. Loix Civiles, &c. pag. 344.

By the Custom of England Lands shall never ascend from the Son to the Father or Mother, (I suppose because of Tenures in Knight Service, &c.) nor to any other Ancestor in the right Line, but shall rather escheat to the Lord of the Fee. Dr. & Stud. Dial. 1. cap. 7. But as to Goods and Chattels, the Father first succeeds his Son or Daughter, if they have no Children. The Mother surviving has but an equal Share with each Brother and Sister after the Death of any of her Children. 1 Jac. 2. c. 17.

3. The ^b Collateral Line succeeds when there are no Descen-^b Nov. 118.
dants or Ascendants in the right Line, without any distinction be-^c 3.
tween (the *Agnati*) the Kinsmen by the Father's side, and (the *Cog-*
nati) the Kinmen by the Mother's side. And 1. Brothers and Si-
sters of the *whole* Blood (call'd *Germani*) succeed each other with-
out any regard, whether the Estate came by the Father or Mo-
ther; and if a Brother and Sister is dead, their Children succeed
into his or her share by *representation*; the half Blood as yet being
excluded. Brothers and Sisters succeed one to the other, because
a less share came to each of them from their Parents upon account
of their number.

V. Numb. 27. 9.

2. Brothers and Sisters *Children* of the *whole* Blood, still exclud-
ing the half Blood. 3. Brothers and Sisters of the *half* Blood e-
qually, if they are all by the same Father or Mother, and the Chil-
dren of those Deceased by representation before the Uncle. ^c But ^c C. 6. 58.
if there are (*Consanguinei*) Brothers and Sisters by the same Father ^{13. 2.}
only, and (*Uterini*) Brothers and Sisters by the same Mother only,
those of the same Father and Mother shall succeed

[According to some Interpreters]

only to that side which brought the Estate into the Family (*sed*
quære.) An Estate gotten otherwise is to be divided equally. 4.
The *Children* of the Brothers and Sisters by the half Blood, be-
fore the Uncle, but not their Representatives: The Emperor allow-
ing no Representation after the Brother's and Sister's Children to

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the

the *Intestate*. Neither could he in *propriety* of Speech allow a Representation even in *that* case. For the nature of a *Representation* is such that it ought to take place where the first had a right in the Goods of the other, as a Son to succeed to the Estate of the Father, being esteem'd but as one Person. Now if the Son dies before the Father, his Children upon the same account have a right to succeed, and therefore is represented by them. But one Brother has no right in the Estate of the other Brother while he is living; and therefore if he dies before his Brother (leaving Children behind him) they cannot in *strictness* be said to represent him in any Right or Claim. 5. All the Collaterals according to the Proximity of their degree, whether it consists of one or more Persons, or whether by the Father's or Mother's side in *infinitum*, there being no fixt degree to bar the Succession.

^a I. 3. 5. 5. For although the Emperor says, The Kindred shall be admitted though in the ^d tenth degree; He does not by that stop the Succession there, but names a round number, and a certain remote degree for a degree that is uncertain. So it is in *infinitum* in the Divine Law. Numb. xxvii. 11. And thus He must be understood, otherwise several ^e Laws which point that way cannot be reconciled. By the Laws of Saxony Succession to Intestates does not exceed the seventh Degree. Groenw. in Inst. Lib. 3. Tit. 4.

^e I. 2. 2. 3.
D. 38. 10. 2. 1.
I. 3. 7. 1.
Nov. 118.
c. 3.

It has been the subject of Debate, whether intimate Friends and our Benefactors ought not in reason to be preferr'd before the remoter Kindred.

This Succession amongst Collaterals is not always observ'd in other Nations; for in some places there is no Representation, and a Brother shall exclude a Brother's Children. Sometimes the Uncle of the Deceased and a Brother's Son succeed equally (as by Custom in Paris) when the Deceased leaves no Brother or Sister. Sometimes the Estate descends only in that Line, from whence it first came. Perez prælect. in C. 6. 58. Num. 13. In the Laws of Holland there is a twofold Succession to an Intestate. The one call'd the Jus Scabinicum, which obtains in the Western Parts of that Country; the other Jus Aesdomicum or Avingicum, which is the Law in the Northern Parts. Vinnii Com. in Inst. 3. 5. in fin. Corv. Enchirid. 3. 1.

By the Laws of England, amongst Collaterals, if there are three Brethren, and the middle Brother or youngest dies, the elder Brother and his Posterity shall inherit Lands in Fee-simple, as Heir before any younger Brother, or any descending from him; for that the eldest is most worthy of Blood. Lit. § 5. 1 Inst. 14. a. Dr. & Stud. Dial. 1. c. 7. Also it is a Maxime in the Laws of England, That if Lands do descend from the part of the Mother, the Heirs of the part of the Father shall never inherit, & vice versa 1. Inst. 13. a. And so it is of Goods by Custom in France. Loix Civiles, &c. 3 Tom. pref. § 4. But if a Son purchaseth Lands in Fee Simple; and dies without Issue, they of his Blood on the Father's side shall inherit as Heirs to him, and afterwards the Blood of the Mother. Lit. § 4. 1 Inst. 12. a. And it is farther to be understood, that none shall have Lands by Descent as Heir to any Man, unless he is Heir of the whole Blood; for an Uncle or a Sister of the whole Blood and their Heirs, shall succeed before a Brother of the half Blood. Thus by Succession

Succession of the Uncle, Lands may ascend collaterally, tho' not in a right Line. Lit. § 6. 7.

The ^f *Husband* succeeds to the Estate of the Wife, and the *Wife* ^g C. 6. 18. 1; to the Estate of the *Husband*, after that the Descendant, Ascendant, and the Collateral Kindred by the Father's and Mother's side is spent.

This Succession is almost out of use since there has been a Community of Estate between Husband and Wife. Groenw. in Cod. 6. tit. 18. And it is unknown in England as to Lands of Inheritance, except that the Husband shall be Tenant for Life by the Courtesy, if he hath had any Child by his Wife; and except that the Wife shall have a third part of the Inheritance of her Husband, of which he was seized during the Espousals. Dr. & Stud. lib. 1. cap. 7. By Articles a Joynture may be settled on her in lieu of her Thirds of the Land. But as to Goods and Chattels, Vide the Notes, page 197, 201, 202.

5. Lastly, the ^g *Exchequer* succeeds, not as Heir but for want of one. ^h The *Exchequer* must pay the Creditors. ⁱ But if the Deceased Person died a Member of any lawful Company or College, that shall succeed before the *Exchequer*. ^g C. 10. 101. ^h 4. ⁱ D. 49. 14. ⁱⁱ C. 6. 62. t. 4.

Otherwise in practice. And in England Lands for want of Heirs escheat to the King, or to the Lord of whom they are holden. ⁱ Inst. 13. a.

This is the latest Rule concerning Successions by Law to the Goods of an Intestate. The old Law was otherwise in many particulars. ^k As by the twelve Tables the Kindred of the Mother's side, could not inherit the Estate of the Father, but were especially qualify'd to it afterwards by the *Prætor*. ^l Neither did the Father succeed in the Estate of his *Emancipated* Children by an Hereditary Right, but by his Right as *Patron*, tho' he did succeed to his Child not *Emancipated*; ^m nor did the Sons of a Brother succeed with their Uncle by Representation; ⁿ nor Sons *Emancipated* to the Estates of their Father; ^o nor a Mother to the Estate of her Children, or the Children to the Estate of the Mother, &c. ^k I. 3. 2. 3. ^l I. 3. 2. 8. ^m I. 3. 2. 4. ⁿ I. 3. 1. 9. ^o I. 3. 2. 3.

All which and much more is recited in the Imperial Institutes. But here it must be again observed, That by the Laws of England, no manner of Goods and Chattels real or personal, ever go to the Heir, but to the Executor or Administrator. Dr. & Stud. l. 1. cap. 7. Vide the Notes page 201, 202.

3. There is a Succession by Grant of the *Prætor* when he gives the *Bonorum-possessio* to any one. *Bonorum-possessio* (being one word as *Jurisdiction*) differs from *Possessio Bonorum*. For this signifies actual Possession only; the other gives a Right as well as Possession. It is defined to be ^p a right of pursuing and retaining the Inheritance ^q of ². ^{By Grant of the Bonorum-Possessio.} ^p D. 37. 1. 3.

^p *Bonorum-possessio est Jus persequendi retinendique Patrimonii, sive rei, quæ cujusque, cum mortuus, fuit.* D. 37. 1. 3. 2.

of some deceased Person, granted by the *Prætor*. It was introduced sometimes to mitigate the rigour of the general Law, sometimes to supply its defects, sometimes to correct it, sometimes to confirm it. In effect the *Bonorum-possessor* differs nothing from the *Heir*, only that the Law gives to the one his Power, and the *Prætor* to the other.

This Grant of the *Prætor* is Twofold.

1. *Decretal*, which in some cases upon bearing the Cause the *Prætor* does decree, not that any one shall succeed the Deceased in his Inheritance, but only that he shall have the right of Possession for some time, till it can be known whether the thing alledged is true or not. Thus the Grant may be a ^s Minor till it is known whether he is the Child of his reputed Father; to a ^t Wife in the Goods of her Husband, till it is known whether she is with Child by him or not; to an ^u Emancipated Son, who is either *disinherited*, or *passed* by in silence, that he may have time to try if the Testament is *inofficious*.

2. ^w By *Edict*, where the *Prætor* gives *Bonorum-possessio* to Persons in a certain degree without hearing the Parties judicially.

^x *Extraordinarily*, by a special Constitution, and to some particular Persons.

^y *Ordinarily*, 1st. where there is a Testament, and the Grant is ^y *secundum tabulas*; which is a Grant of the Goods to him who is already instituted Heir by the Testament, and by strictness of Law cannot act; or *contra Tabulas*, which is a Grant of the Goods contrary to the disposition of the Testament, when the Children or Parents, &c. are *passed* by in the Testament without just cause. But when the Grant is made *contra Tabulas*, it is reasonable that there should be a ^z *Collation*, or Contribution of all the Goods (which at any time came from the deceased Person) into a common stock, unless the Testator ordered the contrary; lest he that hath the Grant *contra Tabulas*, should be admitted into an equal division of the Inheritance, and not make an allowance for that part which he had receiv'd before from the Testator while alive. ^a Not but that this Collation may be upon the Goods of a Person that dies also *Intestate*, and shall oblige all the *Descendants*, whether they succeed in the Male or Female Line; but not those that succeed as *Ascendants* or ^b *Collaterals*, or that take as *Legatees* by Testament.

Regularly those ^c Goods are brought into a *Collation* or *Common Fund*, which came from the Ascendant while alive, for the Maintenance and Provision of the Descendant. But not ^d Gifts or Rewards for Services, nor the ^e price of Ransom from Captivity in War; though Money paid for a Fine, or to save one from Punishment, ought to be brought into the Contribution; for the fault of one ought not to be prejudicial to another. So the ^f Portion, the Jewels, the precious Garments, and Gold Chains, given to a Daughter in Marriage; but not the Expences for the Marriage-Feast; for that seems rather to be given for the Credit of the Father, and not as part of the Portion; nor the charge of necessary Educa-

^z *Prætor Bonorum-possessorem Hæredis loco in omni causa habet.* D. 50. 17. 117.

Education; for every Child hath already had such a Share; nor the Charge which the Father hath been at in 2 Books for the Son; ^{8 D. 10. 2.} nor the Charge which the Father laid out for the Son, that he ^{50.} might take a Degree, or acquire any other honourable ^h Title; for ^{h D. 37. 6.} if the Son dies, his Successor can have no advantage by it. Upon ^{16.} this account therefore the Costs expended in ⁱ Equipage, for a Son ^{i C. 6. 21. 20.} to go to the Wars, shall come to the common Contribution, because he receives Pay from the Publick. ^{2dy,} Where there is no Testament, and the Person dies Intestate, of which there are now but ^k four kinds. *Unde Liberi*, when the Children are to succeed ^{k I. 3. 10. 4.} the Intestate. *Unde Legitimi*, which is given to the Parents or Kindred. *Unde Cognati*, which is given to the next of Kin on the part of the Wife.

This was not allow'd by the Civil Law. But the distinction between the Agnati and Cognati is now wholly taken away by Jullinian as before-mention'd.

Unde Vir & Uxor, by which the Survivor of the Husband or Wife by the Grant of the *Prætor* succeeded each other in Estate when the Kindred fail'd.

Perhaps in several of these Cases the Grant of the *Prætor* may not be absolutely necessary, but application hath been made to him for the greater caution to strengthen the Title, or to gain more Privileges than might be enjoy'd without it.

Parents and Children must apply to the *Prætor* for this Grant within a ¹ year after it comes to their knowledge, that they had a Right ^{I. 3. 10. 5.} to petition for it. Others within a hundred days, or else the benefit of it is lost; and this is so appointed, that the Creditors may not be delay'd.

The Bonorum possessio is not in use. Groenw. de Legibus Abrog. in Inst. Lib. 3. Tit. 10. For the Succession by Testament, and by Law, comprehends every case.

In the Laws of England, as to Goods and Chattels the Stat. 31 Ed. 3. c. 11. injoin'd the Ordinary to grant Letters of Administration of the Goods of an Intestate to his next and most lawful Friends, who were to have the benefit of an Executor and to take all. This seems to be in imitation of the Grant of the Bonorum-possessio by the Prætor. The 21 H. 8. cap. 5. directs that Administration of the Intestate's Goods shall be granted to his Widow, or next of Kin to the Intestate, or both, as the Ordinary shall think fit. And then the Stat. of the 22 and 23 Car. 2. cap. 10. orders the Distribution of the Surplusage after Debts and Funeral Expences amongst the Kindred, viz. one Third to the Wife, the residue amongst the Intestate's Children, and such as legally represent them, if any of them are dead; other than such Children (not Heirs at Law) who shall have an Estate by Settlement of the Intestate in his Life-time, equal to the other Shares. Children (other than Heirs at Law) advanced by Settlements or Portions not equal to the other shares, shall have so much of the surplusage as shall make the Estate of all to be equal. If there are no Children nor legal Representatives of them, one Moity shall be allotted to the Wife, the residue equally to the next

F f f

of

of Kindred to the intestate in equal degree, and those who represent them. No Representatives shall be admitted amongst Collaterals after Brother's and Sister's Children. And if there is no Wife, all shall be distributed amongst the Children, and if no Child, to the next of Kin to the Intestate in equal degree and their Representatives.

By 1 Jac. 2. c. 17. If a Brother or Sister dies, each Brother and Sister or their Representatives have an equal Share with the Mother.

Hence you may observe the Analogy between the Laws of the Romans and the Laws of England, as to the Manner of Succession by Law to an Intestate, and by grant of the Bonorum-possessio, with the Collatio bonorum amongst the Children; and that our Laws are often rais'd upon a Roman Foundation.

Thus have I shewn how *Things* or *Rights* are divided, how they are acquired by the Law of Nations, by Occupancy, Accession and Tradition; and how by the Civil or Positive Law, by Prescription, by Gift, by Succession, which was by *Testament*, (wherein I made some general Observations on Testaments, Testators, Heirs, Legacies, and Codicils) by Law to an Intestate, by Grant of the *Bonorum-possessio*.

^m I. 3. 11.

^m There are more Instances of acquiring by the Civil Law; but as they relate to *Arrogation*, *Adoption*, or the Grants of *Freedom*, I shall omit them as useless and *obsolete* — Thus much of *Things* or *Rights*, the *Second Object*.

B O O K III.

Of A C T I O N S.

C H A P. I.

Of Obligations, Covenants and Contracts in General, the Foundation of Actions.

THE *Third* Object of the *Civil* Law is *Action*, by which is signified the *Order* of *Judicature*. For in the Word *Action*, the *beginning* of *Judicature*, *Progress* and *End*, is to be understood, as was before mention'd.

That this *third* Object of the Law may be better apprehended, I shall shew in this Third Book. 1. The Nature of Obligations, Covenants, and Contracts in general, which are the Foundation of Actions and Judicature. 2. The Nature of Obligations from Contracts in particular. 3. The Extent of Obligations arising from private Trespasses. 4. Of Obligations from publick Crimes, and how Crimes are extinguished. 5. And lastly, In the fourth Book, I shall give an Account of *Actions* arising from these Obligations, *i. e.* an Account of the *Order* of *Judicature*.

To give then an Account of Obligations, Covenants and Contracts in general,

I. ^a An *Obligation* is the Cause of an Action, and a *legal Bond* Of Obligations. *or Tye, which compels by Action to give or to do according to the Roman Law.* But in general it is either *Natural, Civil, or Mixt.* ^{a I. 3. 14. pr.}

1. A ^o *Natural* Obligation is that which arises only from mere ^o *Natural Equity.* By this Kings and the supreme Powers are bound ^{95. 4.} to one another, and to their Subjects.

A natural Obligation is *Effectual* or *Ineffectual*.

^p *Effectual*, which though it is not foundation enough for an Action ^{p D. 2. 14.} on by the *Roman* Law, yet it may bar by way of *Plea* or *Exception*. ^{7. 4.} ^q Wherefore if one is paid a Sum by mistake, which was only ^{q D. 12. 6. 26.} due in Conscience, it shall not be recall'd if that claim is pleaded. ^{12.}

^r Sureties or Covenants may be made for the performances of such ^{r I. 3. 21. 1.} Obligations, as upon a *naked* Promise, without Cause or a Consideration. ^s *Stoppage* of payment, or *Compensation* to an Action, may ^{s D. 16. 2. 6.} arise from it, and may be pleaded. It may be ^t changed and transferred ^{t D. 46. 2. 1.} ^{1.}

^a *Obligatio est Juris vinculum quo necessitate astringimur alicujus Rei solvendæ, secundum nostræ Civitatis Jura. I. 3. 14. pr.*

^o *Is naturâ debet, quem Jure Gentium dare oportet, cujus fidem secuti sumus. D. 50. 17. 84. 1.*

Quibus naturâ debeatur, ii non sunt loco Creditorum. D. 50. 16. 10.

fer'd into a Civil Obligation, or a Natural Obligation of another *Species*.

Ineffectual, which has no Assistance from any positive Law, but consists merely in the Pleasure and Conscience of the Party. ^u As the Obligation to Gratitude, to return Gifts for Gifts; to ^w pay the whole Legacy to every one, when by the Law *Falcidia* the Heir may deduct a fourth part. ^x An Obligation not to take advantage of a Will, which wants some formal Solemnities to the perfection of it. An Obligation to be Merciful or Liberal. These may bind if the Person pleases, but such Actions cannot be forced from him. And the reason of this Policy which denies Actions to some Natural Obligations or any Assistance at all (even so much as by Exception) to others, is because it lessens the occasions of Suits, and the Power of Judges over the Fortunes of Men; and because it is an incitement to Virtue, by leaving some things merely to the Integrity of the People; for which there would be but little room, if Mankind acted in Obedience only to positive Laws.

2. A *Civil* Obligation is that which owes its birth to the strictness of a positive Law without Natural Equity. ^y As an Obligation arising from a Promise made through Fear, Error, or Fraud. The Action is allow'd to be brought, but when that matter of Fact is shew'd by Plea or Exception, the Action must be dismissed. Such is an Obligation arising from a ^z Sentence or Judgment, which is supposed true in Law, though really unjust. So a *Decisory* Oath by consent of Parties, or *Confession* in Court is conclusive as a Civil Obligation, and presumed to be true, tho' it may be false. ^a Thus upon an Acknowledgment under Hand that a Sum of Money was receiv'd which was never paid; if an Exception is not made within two Years, it shall be presum'd that it was received. These are merely Civil Obligations, but must be of necessity allow'd as true and certain, that there may be some end of Examination and Enquiries.

3. A *Mixt* Obligation is a legal Bond, having its strength both from Natural and Civil Laws. Such are the Obligations from *Contracts*, from *Trespases*, and from *Crimes*; on which an Action or Process is truly founded, and which are the proper Object of this part of the Law. Therefore this sort of Obligation only was defined by *Justinian*. *Vide pag. 203.*

In the Laws of England an Obligation signifies a Penal Bond.

II. A Covenant (*Pactum* or *Conventio*) is an ^b Agreement made by the consent of two or more to give, to do, or not to do. Because it is of two or more, a ^c Testament or last Will cannot be a Covenant. ^d And a Promise to the Commonwealth, or a *Vow* ^e to God, is not a Covenant; for each is but the act of one Person only.

A *Covenant* is either ^f (*Nudum Pactum*) a *Nude* Covenant, or a *Contract*.

I. A

^b *Pactio est duorum pluriumve in idem placitum Consensus.* D. 2. 14. 1. 1.
^c *Quid tam congruum Fidei Humanæ, quam ea quæ inter eos placuerunt, servare.* D. 2. 14. 1. pr.

1. A *Nude Covenant* is that which is barely an Agreement, ¹ C. 4. 65. 27. which hath no certain name in the Law, nor cause nor consideration of its making. As when it is agreed between us that I should give you my Bondman *Pamphilus*, and that you should give me *Stichus*; or that I should give you an Horse, and that you should draw my Picture, without proceeding any farther to give or deliver, but resting only in the discourse of it. And tho' this agreement is drawn into ^h Writing, it is not the less a *Nude Covenant*, for Writing cannot change the nature of it, neither can Writing amount to a cause or consideration of the agreement, but it is only made use of for ⁱ proof. ^h D. 2. 14. 7. ^{12.}

^k *Nude Covenants* in general have their effect by Plea and *Exception* only, not by *Action*; yet for some particular reasons the *Roman Law* in two Cases hath granted *Actions* upon a *Nude Covenant*. ¹ D. 22. 4. 4. ^h D. 2. 14. 7. ^{4.}

First, When those *Nude Covenants* are made valid by a particular Law, and for that reason are call'd ¹ *Pacta Legitima*. Of this nature is the Covenant concerning ^m *Gifts*, where if one says by Words of the present time, I give you a Hundred Crowns, the Emperor *Justinian* by a particular Law hath granted an *Action* for them; but if the Words denote a future time, as I *will* give, &c. no *Action* can ensue, ⁿ but the Law remains as it was before. Such is the agreement for Interest of Eight *per Cent.* allow'd to Bankers by a ^o *Novel Constitution*; because of their great use to the Publick, and the hazards they run, though no particular mention of Interest was made, and though such Interest is not allow'd in other Cases. Such is the Covenant of forgiving and releasing an *Action* of Injury, &c. which is expressly confirm'd by the Law of the *Twelve Tables*. Also an agreement by ^q *Stipulation*, ^r *Acceptilation*, or an *Obligation by Writing*. [*Vide. chap. 4*] ¹ D. 2. 14. 6. ^m C. 8. 5. 4. ^{35.} ⁿ C. 7. 62. ^{32. 6.} ^o Nov. 136. ^{c. 4.} ^p D. 2. 14. 27. 2. ^q D. 2. 14. 1. 3. ^r I. 3. 22.

Secondly, An *Action* may arise upon a *Nude Covenant*, which is added to a real Contract made upon a good Cause or Consideration, and it is called *Pactum adjectum*. For example, he that sells is bound of Course to warrant the Title to the Buyer, but he is not bound to give a ^s *Surety* or Bondsman to secure that Title. If it is agreed (*ex incontinenti*) in the very act of making the Bargain, that the Seller should give *Surety* or Bondsman, this agreement shall be lookt upon as part of the Bargain and Purchase, and the Buyer shall force the Seller upon his Promise to give such a Bondsman accordingly. Yet if that Promise is made (*ex intervallo*) ^t after the agreement of buying was perfect, the Buyer hath no *Action* upon it. ^s D. 21. 2. 37. ^t D. 2. 14. 7. ^{5.}

The Romans only made a distinction between a *Nude Covenant* and *Stipulation*, requiring a certain solemn form of Words to make such a Covenant effectual, and giving an *Action* upon account of the *Stipulation* not upon the Covenant. The ^u Canon Law from natural Equity and Conscience directs that it ought to oblige, and that a *Nude Covenant* does create an *Action*. And so by Custom a *Nude Covenant* seriously made and with deliberation is good, and has the force of a *Stipulation*. ^u c. 1. c. 2. ^{X. de pactis.}

G g g

^k *Nuda pactio Obligationem non parit.* D. 2. 14. 7. 4.

Stipulation in our Neighbouring Nations. Groenw. de Legibus Abrogat. in l. 10. Cod. de Pactis. Vinnii Comment. in Lib. Inst. 3. Tit. 14. § 2. num. 11.

It is not much argued in the Laws of England what diversity there is between a Covenant, a Contract, Promise, Gift, Loan, or Pledge, or Bargain, or Concord, &c. For there a Nude Covenant is where a Man makes a Gift, Bargain, or Sale of his Goods or Lands, without any certain recompence paid, or recoverable by Action for them, which (they say) is void in Law and Conscience. Dr. & Stud. Lib. 2. cap. 24. But if he to whom a Promise of a recompence is made, undergoes any charge or business and hath perform'd it by reason of that promise, he hath his Action; for it is not a Nude Covenant. (Eod.) An Obligation or Bond is good without a consideration; but a simple Note in Writing is not good. [Vide antea p. 170]

* D. 2. 14. 7.
1 & 2.

A Contract is an *Agreement upon a Cause or Consideration, giving an Action to force a performance.* It is divided into proper and improper Contracts. [Vide chap. 6.]

A true proper Contract is also of two Kinds; One hath a special particular Name and a Cause and Consideration of its making; and One hath not a particular name but hath a Cause to support it. The first is call'd a *Nominate Contract*, the second *Innominate*.

Nominate Contracts have acquired a special name from their frequency of being made use of in Commerce, and because the nature of them is so well understood, without any particular description, that the bare naming the Contract gives a sufficient information. These infer a mutual Obligation, and have a certain formal Action annexed to them.

Innominate Contracts are those Contracts which want a special Name, and have no certain form of Action to recover, but an Action of the Case, or in *factum præscriptis verbis*. Innominate Contracts are describ'd * four ways, viz. *Do ut des*, under which permutation or exchange may be comprehended, *Do ut facias*, *Facio ut des*, *Facio ut facias*. Which description also comprehends *Nominate Contracts*. These general Terms are made use of, because there are more Things than Words to express them, and therefore they cannot be brought into a better method.

We need not much insist upon the distinction of *Nominate* and *Innominate Contracts*; for the Moderns do not make use of the particular names of the Contracts in their Suits, or the solemn forms of Actions at this Day. Groenw. de Legibus Abrog. in Inst. Lib. 4. tit. 6.

A Contract must have a Cause or Consideration whether it hath a name or not. I do not mean a final or moral Cause that moved or persuaded to the Agreement, but by a Cause or Consideration, I mean something which consists in giving or doing by one of the Parties, in pursuance of the Agreement.

Others

* *Contractus est Conventio, habens certum nomen vel causam sui naturæ Obligationem ad agendum efficacem produciens.* D. 2. 14. 7. 1 & 2.

^y Others define a Contract to be properly an *Agreement from*, D. 50. 16. whence an *Obligation arises on both sides*, and fancy that it cannot be ¹⁹ a Contract unless it is *actus contra actum*, but this is not solid; for a ² *Mutuum* and *Stipulation* are Contracts where one Party is only ^{Ibid.} under an *Obligation*, and where an *Action* lies but on one side. I rather think it to be call'd a Contract, because after many Debates the affair is *contracted* into an *Agreement* between the Parties. ^a So. D. 2. 14. pr. the word *Pax* arises from *Pactum*.

In every Contract the *Substance*, the *Nature* and the *Accidental* parts of it may be consider'd.

1. The *Substance* of a Contract is its *Essence*, and is that without which there can be no such Contract, as in buying and selling there must be *Consent*, *Goods sold*, and a *Price*. In *Society* *Consent*, and a *Communion* of Goods: In *Stipulation*, a *question* and an *answer*, &c. which *Essentials* cannot be omitted by *Agreement*.

2. The *Nature* of a Contract is that which is tacitly implied in such a Contract, as it is implied in the nature of *Sale*, that you should warrant the *Title* of the thing sold. This may be changed or omitted by *Covenants*.

3. The *Accidental* parts of a *Covenant*, are those which are neither of the *substance* or the *nature* of the Contract; as when it is agreed that in buying and selling the *Sale* should be upon *Condition*, or that the *Commodity* should not be deliver'd till a *certain day*.

You will often meet with the distinction of Contracts into those that are *bonæ fidei*, and *stricti Juris*; but it means no more than that *some* Contracts are guided by plain *Honesty* and *Conscience*, and that they include several things, tho' not expressly mention'd; and that *others* stick close to that which is expressly agreed on.

These *Rules* ought to be observ'd in the *Interpretation* of Contracts.

^b The *Agreement* in a Contract is the *Law* of it.

^b D. 16. 3.

^c The beginning and consideration of every Contract is to be considered.

^c 1. 6.

^c D. 17. 1. 8.

^d If the *Sense* of the Contract is obscure, That *Sense* must be followed which is most likely and probable, or most according to common Practice.

^d D. 50. 17.

^d 114.

^e In doubtful Cases the mildest Interpretation is the safest.

^e D. 50. 17.

^f All parts of the Contract ought to be explained, the one by the other, and regard ought to be had to the *Preamble* of it.

^f 56.

^f D. 45. 1.

^f 134. 1.

If

^y *Contractus est ultro citroque Obligatio.* D. 50. 16. 19.

^b *Contractus legem ex Conventionione accipiunt.* D. 16. 3. 1. 6.

^c *Uniuscujusque contractus initium spectandum est, et causa.* D. 17. 1. 8. *Hoc servabitur quod initio convenit.* D. 50. 17. 23. *Cujusque Rei potissima pars Principium est.* D. 1. 2. 1.

^d *In obscuris inspicere solere quod verisimilius est, aut quod plerumque fieri solet.* D. 50. 17. 114.

^e *Semper in dubiis benigniora præferenda.* D. 50. 17. 96.

In re dubia benigniorem interpretationem sequi non minus justius est, quam tutius. D. 50. 17. 192. 1. *Semper in obscuris quod minimum est sequimur.* D. 50. 17. 9. *Etigendum est quod minimum habet iniquitatis.* D. 50. 17. 266.

^f *Plerumque ea quæ in præstationibus convenisse concipiuntur, etiam in stipulationibus repetita creduntur.* D. 45. 1. 134. 1.

- ^g D. 50. 17. 96. ^g If the intention of the Parties does evidently appear, the Intention ought to be follow'd rather than the *Words* or literal Sense; and sometimes regard ought to be had to the Custom of the Country.
- ^h D. 50. 17. 67. ^h If the terms of a Contract are equivocal, that meaning ought to be followed which relates to the subject of the Agreement.
- ⁱ D. 45. 1. 38. 18. ⁱ Interpretation ought to be in favour of him that is to be obliged by the Covenant. For he that is obliged may be presum'd that he designed to perform the least. And it was the other's fault that he did not express himself in better terms.
- ^k D. 50. 17. 110. 3. ^k If an Agreement is in the disjunctive, he that is to be bound hath his Election.
- ^l D. 50. 16. 21. ^l Sometimes conjunctive words are to be taken disjunctively, where the Sense leads to it.
- ^m D. 50. 17. 73. 3. ^m Those Expressions which cannot be understood in any sense ought to be ^m rejected, as if they had never been written.
- ⁿ D. 50. 17. 94. ⁿ Superfluous words do not make a writing void.
- ^o D. 50. 17. 195. ^o Express words sometimes are prejudicial, which, if omitted, had done no harm.
- ^p D. 50. 17. 92. ^p If the Error of the Notary in writing is apparent, the Contract ought to be supported.
- ^q D. 50. 17. 14. ^q In all Contracts, where no Day of performance is added, the performance ought to be presently.
- ^r I. 3. 16. 2. ^r He that is to pay or deliver, is in no Delay, till after the last moment of the Day appointed.
- ^s D. 50. 17. 17. ^s A time is fixed for the sake of him that is to be obliged.
- ^t D. 15. 17. 23. ^t No one ought to be answerable for inevitable Accidents, unless he enter'd into Covenant to stand to them.

Every

^g In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset. D. 50. 17. 96. In Conventionibus contrahentium voluntatem potius quam verba spectari placuit. D. 50. 16. 219.

^h Semper in Stipulationibus & in cæteris contractibus id sequimur quod actum est. Aut si non appareat quid actum est, sequamur quod in Regione, in qua actum est, frequentatur. D. 50. 17. 32.

ⁱ Quoties idem sermo duas sententias exprimit, ea potissimum accipiat quæ rei gerendæ aptior est. D. 50. 17. 67. Quoties in Stipulationibus ambigua Oratio est, commodissimum est id accipi, quo res de qua agitur in tuto sit. D. 41. 1. 80.

^j In Stipulationibus cum quaeritur quid actum sit, verba contra stipulatorem interpretanda sunt. D. 45. 1. 38. 18. Pæctio obscura vel ambigua Venditori & qui locavit nocere placet, in quorum fuit potestate legem apertius conscribere. D. 2. 14. 39.

^k Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. D. 50. 17. 110. 3.

^l Conjunctio nonnunquam pro disjunctione accipitur. D. 50. 16. 21.

^m Quæ ita sunt scripta ut intelligi non possunt, perinde sunt ac si scripta non essent. D. 50. 17. 73. 3.

ⁿ Non solent quæ abundant vitare scripturas. D. 50. 17. 94. Quæ Dubitationis tollendæ causa contractibus inferuntur, Jus commune non lædunt. D. 50. 17. 81.

^o Expressa nocent, non expressa non nocent. D. 50. 17. 195.

^p Si Librarius in transcribendis Stipulationis verbis errasset, nihil nocet. D. 50. 17. 92.

^q In omnibus obligationibus in quibus dies non ponitur, præsentis die debetur. D. 50. 17. 14.

^r Totus dies arbitrio solventis tribui debet. I. 3. 16. 2.

^s In Stipulationibus promissoris gratia tempus adjicitur. D. 50. 17. 17.

^t Quæ sine culpa accidunt, à nullo præstantur. D. 50. 17. 23.

- ^a Every thing may be dissolved by an Act contrary to that which at first made it. D. 50. 17. 35.
- ^a No one can do an Act to himself; as one cannot mortgage to himself, or buy, &c. what is his own. D. 50. 17. 45.
- ^a The Agreements of private Persons are not valid, if they are derogatory to the publick Interest. D. 50. 17. 45. 1.
- ^y Those that do mistake do not consent. D. 50. 17. 116. 2.
- ^a What is prejudicial to the Parties contracting, is prejudicial to their Heirs or Successors. D. 50. 17. 143.
- ^a No Man is cheated that knows it and consents to it. D. 50. 17. 145.
- ^b An Obligation to perform what is impossible is void. D. 50. 17. 185.
- ^c He that is to bear the loss of any thing, ought to receive the Profits of it. D. 50. 17. 19.
- ^d He that contracts with another, ought to know who he deals with, his State and Condition. D. 50. 17. 23.
- ^e An Agreement to cheat is not valid. D. 50. 17. 206.
- ^f No one ought to enrich himself by doing injustice to others. D. 50. 17. 134. 1.
- ^a No Man shall take a Benefit of his own wrong. D. 50. 17. 82. 14. 27. 4.
- ^a Contracts against Law and good Manners are not to be observed. C. 2. 3. 29.
- ^b No one ought to be suffered to act against his own Agreement. D. 50. 17. 60.
- ⁱ If one confirms what has been done in his name, he shall be esteemed to have given a Commission for it. D. 50. 17. 27.
- ^a The solemn form of Contracts cannot be altered by private Agreement, tho' the accidental Circumstances may be altered. D. 50. 17. 27.

A

^a Nil tam naturale est quam eo genere quodque dissolvere, quo colligatum est. D. 50. 17. 35. Omnia quæ jure contrahuntur contrario jure pereunt. D. 50. 17. 100. Fere quibusvisque modis obligamur in contrarium Actis liberamur & cum quibus modis acquiritur, eisdem in contrarium Actis amittimus. D. 50. 17. 153.

^a Neque pignus, neque depositum, neque precarium, neque emptio, neque locatio rei suæ consistere potest, D. 50. 17. 45.

^a Privatorum conventio Juri publico non derogat. D. 50. 17. 45. 1.

Utilitas publica præfertur contractibus privatorum. C. 12. 63. 3.

^y Non videntur, qui errant, consentire. D. 50. 17. 116. 2. In omnibus Rebus quæ Dominium transferunt, concurrat oportet Affectus ex utraque parte contrahentium. D. 44. 7. 55.

^a Quod ipsis qui contraxerunt obstat, & successoribus eorum obstat. D. 50. 17. 143. Non debes melioris Conditionis esse quam auctor meus. D. 50. 17. 175. 1.

^a Nemo videtur fraudare eos qui sciunt & consentiunt. D. 50. 17. 145.

^b Impossibile nulla obligatio est. D. 50. 17. 185. Ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur. D. 50. 17. 139. vid. D. 50. 17. 182 & 188.

^c Secundum naturam est commoda cujusque Rei eum sequi quem sequuntur incommoda, & contra. D. 50. 17. 10. Ex qua persona quis literum capit, ejus factum præstare debet. D. 50. 17. 149.

^d Qui cum alio contrahit vel est, vel esse debet, non ignarus conditionis ejus. D. 50. 17. 19.

^a Non valet si convenit ne Dolus præstetur. D. 50. 17. 23.

^f Jure naturæ æquum est neminem cum alterius detrimento fieri locuplettorem. D. 50. 17. 206.

^a Nemo ex suo delicto meliorem suam Conditionem facere potest. D. 50. 17. 134. 1.

^a Pacta quæ turpem causam continent non sunt observanda. D. 2. 14. 27. 4.

^b Nemini licet adversus pacta sua venire & contrahentes decipere. C. 2. 3. 29.

ⁱ Si quis ratum habuerit quod gestum est, obstringitur mandati actione. D. 50. 17. 60. Ratihabitio retrahitur & mandato comparatur. X. de Reg. Juris 10.

^a Nec ex prætorio nec ex solenni Jure privatorum conventionum quicquam immutandum est, quamvis obligationum causæ pactione possunt immutari & ipso Jure. D. 50. 17. 27.

FF h h

- ^l D. 50. 17. 85. 1. ^l A legal Contract may continue in force, tho' a Case afterwards happens from whence it could not commence.
- ^m D. 50. 17. 38. ^m A Debtor is rather to be favoured than a Creditor.
- ⁿ D. 50. 17. 41. 1. ⁿ Creditors upon good consideration ought to be paid before those that claim by Gift, &c.
- ^o D. 50. 17. 115. ^o He that has been forgiven a Debt may be supposed to have received so much Money.
- ^p D. 50. 17. 26. ^p It is one thing to *sell*, and another thing to consent to a *sale*; where there is a different reason for it, or where the consent is to be from a different Person.
- ^q D. 50. 17. 165. ^q He that may alienate may consent to the Alienation, where there is the same reason for the one as well as the other.
- ^r D. 50. 17. 163. ^r He that may give a thing, may sell it, unless a particular Law forbids it.
- ^s D. 50. 17. 126. ^s No one takes away a thing by force that pays the full price of it.
- ^t D. 50. 17. 171. ^t The Creditor of my Creditor cannot make a demand of me by paying my Debt.
- ^u D. 50. 16. 12. 1. ^u He that delays to pay what is due, pays less than is due.
- ^w D. 50. 17. 66. ^w He ceases to be a Debtor that has a good Exception or Plea in his defence.
- ^x D. 50. 17. 63. ^x He does not delay Payment who is willing and urgent to try the Right.
- ^y D. 50. 17. 134. ^y The Creditors are not defrauded if a Debtor does not improve his Estate, but when he alienates a part of it.
- ^z D. 50. 17. 78. ^z He is defrauded who is hinder'd from Advantages that might have been made, as well as from present Profit.
- ^a D. 4. 4. 17. 16. 4. ^a In buying and selling the Law of Nations connives at some cunning, and over-reaching in respect of the Price.
- ^b D. 50. 17. 116. 1. ^b No one is supposed to be deceived while he acts according to Law.

The

^l Non est novum ut quæ semel & utiliter constituta sunt, durent, licet ille casus extiterit, à quo initium capere non potuerunt. D. 50. 17. 85. 1.

^m Favorabiliores Rei potius quam Actores habentur. D. 50. 17. 38.

----- Cui damus Actiones, eidem exceptionem competere multo magis quis dixerit. D. 50. 17. 156. 1.

ⁿ In re obscura melius est favere repetitioni quam adventitio lucro. D. 50. 17. 41. 1.

^o Si quis obligatione liberatus sit, potest videri cepisse. D. 50. 17. 115.

^p Aliud est vendere, aliud vendenti consentire. D. 50. 17. 26.

^q Cum quis alienare, poterit & alienationi consentire. D. 50. 17. 165.

^r Cujus est donandi, eidem & vendendi & concedendi jus est. D. 50. 17. 163.

^s Nemo prædo qui pretium numeravit. D. 50. 17. 126.

^t Nemo ideo obligatur quia recepturus est ab alio quod præstiterit. D. 50. 17. 171.

^u Minus solvit qui tardius solvit. Nam & tempore minus solvit. D. 50. 16. 12. 1. Plus est statim dare, minus est post tempus dare. I. 3. 20. 5.

^w Desinit Debitor esse is qui nactus est exceptionem justam, nec ab æquitate naturali abhorentem. D. 50. 17. 66.

^x Qui sine dolo malo ad Judicium provocat, non videtur moram facere. D. 50. 17. 63.

^y Non fraudantur Creditores cum quid non acquiritur à Debitore, sed cum quid de bonis dimittitur. D. 50. 17. 134.

^z Generaliter cum de Fraude disputatur non quid habeat Actor, sed quid per Adversarium habere non potuit, considerandum. D. 50. 17. 78.

^a In pretio emptionis & venditionis naturaliter licet contrahentibus se circumvenire. D. 4. 4. 16. 4.

^b Non capitur qui Jus publicum sequitur. D. 50. 17. 116. 1.

^c The same thing cannot be demanded twice of the same Person ^c D. 50. 17. 57. by virtue of the same Obligation.

^d In Contracts the Heir is answerable for the Frauds of the deceased, where there is a Covenant to bind him. ^d D. 50. 17. 152.

^e No one can have a Title by the Fraud of another that acts for him. ^e D. 50. 17. 49.

^f Fraud is not to be judged of by the event only, but also by the design. ^f D. 50. 17. 79.

^g He who is persuaded that he has a Right, may be guilty of a Mistake, and not of Deceit. ^g D. 50. 17. 177. 1.

^h He that promises to pay must have so much time allow'd for payment, as the distance of the Place, or the nature of the Thing promised does require ^h D. 50. 17. 186.

ⁱ A Madman cannot contract at all, no not with the consent of his Guardian; but a Minor above seven Years of Age may contract by himself, where it is to his own Advantage; and in all Cases with the consent of his Guardian when he is above that Age.

Thus of Obligations, Covenants and Contracts in General.

CHAP. II.

Of the Nature of Obligations from Contracts in Particular, and first from a Thing done, and therein of Mutuum Commodatum, Depositum, and Pignus.

I Said a Contract was either a *True* and a proper Contract, or a *Quasi* and improper Contract, *i. e.* something of that nature.

True *Nominate* Contracts are subdivided into ^k four *Species* of ^k I. 3. 14. 2. Obligations. 1. *Ex Re*, from a Thing done. 2. *Ex verbis*, from Words. 3. *Ex Literis*, from Writing. 4. *Ex Consensu*, from Consent. Of the first in the present Chapter, and of the others in the three following.

From a Thing done, an Obligation is contracted, when something *given* or *done* upon a previous consent induces an Obligation.

Innominate Contracts are also comprehended under this Description; but because they are Infinite in their natures, I cannot bring them

^c Bona fides non patitur ut bis idem exigatur. D. 50. 17. 57. ----- Quoties concurrunt plures Actiones ejusdem rei nomine, una quis experiri debet. D. 50. 17. 43. 1.

^d In contractibus quibus Doli præstatio vel bona fides inest, Hæres in solidum tenetur. D. 50. 17. 152. In contractibus successores ex dolo eorum quibus successerunt, non tantum in id quod pervenit, verum etiam in solidum tenentur. D. 50. 17. 157. 2.

^e Alterius circumventio alii non præbet actionem. D. 50. 17. 49.

^f Fraudis interpretatio semper in Jure Civili non ex eventu duntaxat, sed ex consilio quoque consideratur. D. 50. 17. 79.

^g Nemo videtur dolo exequi, qui ignorat causam cur non debeat petere. D. 50. 17. 177. 1.

^h Nihil peti potest ante id tempus quo per rerum naturam persolvi possit. D. 50. 17. 186.

ⁱ In negotiis contrahendis alia causa habita est Furiosorum, alia eorum qui fari possunt, quamvis Actum rei non intelligerent. Nam Furiosus nullum negotium contrahere potest: pupillus omnia Tutore auctore agere potest. D. 50. 17. 5.

them into any order. I shall therefore only describe (according to the ordinary Method) the *Nominate* and Common Contracts, which are *Four*.

¹I. 3. 15.

I. ¹ *Mutuum* (a Loan simply so call'd *quod de meo tuum fiat*)

It hath no one particular name in the English Language.

is a Contract introduced by the Law of Nations, in which a Thing that consists in weight (as Bullion,) in number (as Money,) in measure (as Wine,) is given to another upon condition that he shall return another thing of the same Quantity, Nature and Value upon demand. More than Consent is required, for the Thing, viz. Money, Wine, or Oil ought to be ^m actually delivered, and more than what was delivered cannot be repaid; ^a but less may be repaid by Agreement. This Contract forces men to be industrious and promotes Trade, and for this reason it may be greater charity to lend than to give. ^o *Creditum* is a more general Word.

^m D. 12. 1.

2. 3.

ⁿ D. 12. 1.

11. 1.

^o D. 12. 1.

2. 3.

^p D. 46. 3. 99.

D. 45. 1. 65.

i.

In the case of Money, ^p Silver may be repaid for Gold, unless the Creditor is to be damnified by it; for it shall be understood to be the same kind of Money when it is of the same Value.

But in several Nations the Creditor shall not be forced to take a great Sum in the smallest Coins, for it looks like Spite and Vexation. Groenw. de Legibus Abrog. in Dig. 46. 3. 99.

What if the value of Money rises and falls, must we follow the Value of it at the time of the Contract, or at the time of the Repayment? Or must that Payment be according to the *Intrinsic* value of the Coin receiv'd, or according to a new *Extrinsic* denomination? I think in strict Justice that the Payment ought to be according to the ^q *Intrinsic* Value, though for the sake of Trade, and in Obedience to the Laws, a Judge ought to decree that the *Extrinsic* Value set on the Coin by lawful Authority, ought to be receiv'd in Payments.

^q D. 12. 1. 3.

The Repayment must be of another thing of the same Quantity, Nature and Value; for if Wine for Oil, for Corn for Wine is return'd, it is not a *Mutuum* but ^r *Exchange*, or that innominate Contract, which we call *Do ut Des*. Upon this account Bread, Flesh, Fish, &c. delivered out by weight (but according to number) may become a *Mutuum*, for the same Quantity and Quality may be return'd. Therefore living Creatures as a flock of Sheep (though they may be number'd) cannot be the Object of a *Mutuum*, because the same Quantity and Quality cannot be return'd; and if so many in number should be restored, more or less in value would be repaid. And as ^s another kind ought not to be repaid without the Consent of the Creditor, so the Creditor is not bound to receive his Debt in
Parcels,

^r D. 19. 5. 5.

i.

^s D. 12. 1, 2

& 3.

¹ *Mutuum est contractus in iis rebus consistens quæ pondere, numero & mensura constat, & quod ita datur ut non eadem, sed alia ejusdem Naturæ & qualitatis, reddatur.* I. 3. 15. pr.

^o *Creditorum appellatione non Hi tantum accipiuntur qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur.* D. 50. 16. 10 & 11. ——— *Debitor intelligitur is, à quo invito, exigere pecunia potest.* D. 50. 16. 108.

parcels, *but may insist upon the Payment of the whole at one time. ^{D. 22. 1. 41. 1.}

A *Mutuum* by the Civil Law is a Contract without reward, and admits of no recompence in its nature, and if Use and Interest is agreed upon, *that arises from a distinct particular Bargain or by Custom of the Country. For this Contract was contrived to promote Charity to those that wanted; but if any one would make advantage of the Property of any thing which he possesses, the Contract of Buying and Selling, or Exchange was for his purpose; and if he would make advantage of using the Goods of which he was Master, letting to hire and hiring was the proper Contract for it. It is the nature of these Contracts, not of a *Mutuum*, to be founded upon Price or Reward. And if one would alienate his Property without Price or Recompence, Giving is a proper way, and if he would part with the Use only gratis where the same thing in *Specie* was to be return'd, then *Commodatum*; but where the same thing in *kind* is to be return'd, then *Mutuum* is the suitable Contract. But if either for *Commodatum* or *Mutuum*, a Reward or Interest is originally agreed to be paid together with the Principal by particular Bargain, it seems contrary to natural Justice. For he that borrows Money, &c. must pay interest for it, though he gains nothing by it, which is to give certain Profit to the Lender, whereas the Borrower himself may have nothing but certain Loss. And this is so far true in right reasoning, that it is contrary to Justice that the Lender should have Interest, though the Borrower made Profit of the Money lent; for that was *Accidental*, and the Borrower ran a risque of losing all, when the Lender was in no danger of losing the least part. All this is to be understood if the Borrower pays within the time appointed, *for if he fails ^{C. 22. 1. 32.} in his Promise then it is fit the Creditor should be allowed his Damages after a Demand. * But upon no account is Interest upon ^{C. 4. 32. 28.} Interest to be endured. Letting to hire and hiring for a Price hath Justice to support it, for if he that hires is hindred to make use of the thing by some inevitable Accident, or if the thing hired is lost or perishes by chance, he that hires will be relieved from Payment, for the Price was intended as a Recompence for some real Advantage; whereas in lending of Money (if Interest is paid of necessity) the same Sum and Interest must be return'd, though the Principal is lost at the same time without any Fault or Neglect of the Borrower. Consider therefore that tho' you are not forced to lend Money any more than to give, yet if you once lend or give (according to the nature of several Acts) it must be without Recompence; otherwise it is not Lending or Giving, but some other Contract which has not yet a certain name.

* Use or Interest is something of the same kind with the Principal, and added to it. In Practice it is divided (1.) Into *Lucrative* ^{C. 4. 32; 28. in fin.} Interest, when it is paid where there has been no Advantage made by the Debtor, and no Delay or Deceit in him.

I i i

This

* Minus solvit qui tardius solvit, nam tempore minus solvit. D. 50. 16. 12. 1. Plus est aliquid statim dare, minus est post Tempus dare: l. 3. 20. 5. Sed minus solutum intelligitur, etiamsi nihil esset solutum. D. 50. 16. 32.

^a C. 4. 32. 26. This is condemn'd by the ^a Civil and ^a Canon Law.

^b C. 1. 8. 16.

X. de usur.

^b C. 4. 34. 4.

^c D. 22. 1. 1.

& D. 22. 1.

17. 3.

Or (2.) ^b *Compensatory*, which is given where the *Mutuum* has been advantageous to the Debtor, and disadvantageous to the Creditor, that he was not paid sooner. (3.) ^c *Punitory*, when it hath been given for delay or breach of Trust.

The two last are permitted by the Laws of all Nations, who call it Interest rather than Use. But in England all manner of Use, not exceeding 5 l. per Cent. is allow'd, 12 Ann. ch. 16. And considering the present posture of Trade, the allowance is unavoidable. In Holland they permit 8 per Cent. to some, and 12 per Cent. to Merchants for a Year. Grot. de Jur. B. & P. Lib. 2. c. 12. num. 22.

^d C. 4. 32. 26. 1.

^e C. 4. 33. 1.

^d Twelve per Cent. is allow'd in some cases; Eight, Six, Four, and Two in other. But this does not extend to *Assurances*, or Insurances at Sea, &c. ^e for there the Advantages may be greater and with Justice. And perhaps it might be good Policy to make no restraining Laws, but to suffer the rising or falling of Trade to direct the Agreements for it. But it is fit that the *Damages* of Delay, which we call *Interest*, should be ascertain'd either by Law or Agreement, otherwise there would be endless Controversies, and Creditors would not fail to alledge extraordinary Damages upon all occasions.

^f C. 4. 32. 27.

In a ^f *Mutuum* when the Interest is equal with the Principal, the Law will allow it no farther.

This is not observ'd. Groenw. de Legibus Abrog. in C. 4. 32. 27.

^g C. 4. 32. 28.

^g Neither may the Interest be made part of the Principal (call'd *Anatocismus*) to evade this Prohibition.

The Practice here also is otherwise. Ibid.

^h D. 22. 1. 32.

ⁱ C. 8. 38. 12.

^k D. 36. 2. 24.

^l D. 46. 3.

72. 2.

It is ^h *Delay* after a demand Judicially made or Extrajudicially; but if a ⁱ Day is added, there is no occasion of demand; for it seems to be added upon no other account than to shew the day of Payment. ^k We must not conclude after this manner if a *Condition* only is added; for the Debtor may be ignorant of the fulfilling of that condition, tho' he cannot be presum'd to be ignorant of the Day appointed. And tho' the Debtor is most frequently in delay, yet the ^l Creditor also may be guilty of it, when his Money is offer'd to him, or paid into the Court in his absence.

Would Men condemn only Lucrative Interest, and Uncharitableness to Poor Persons, the Justice of Usury might be easily accounted for,

^h Mora fieri intelligitur non ex re sed ex Persona, id est, si interpellatus opportuno loco non solverit: Quod apud Judicem examinabitur; nam difficilis est hujus rei definitio. D. 22. 1. 32. Unicuique sua mora nocet. D. 50. 17. 173. 2. Sed nulla intelligitur mora ibi fieri, ubi nulla petitio est. D. 50. 17. 88. Qui sine dolo malo ad Judicium provocat non videtur moram facere. D. 50. 17. 63.

for, and a Word might be found out larger than *Mutuum* or *Commodatum* to make a distinct Contract.

If Money is lent to young Men of full Age (not Emancipated) without the consent of their Fathers, it ought to be consider'd whether the Money should be repaid: And such lending ought to have the same effect, if the Obligation is disguised under the appearance of another Contract; as by a pretended sale of Wares, which may again be sold for Money. The Cheats of Usurers grew to such an excess in *Rome*, in reference to their Dealings with young Men, that the Senate made a particular ^m Decree to restrain ^m D. 14. 6. 11 them.

Because this is not prohibited by the natural Law, there is no such direct prohibition in the Laws of England, or in any Country of Europe, but the Judge would do well to enquire (even after the Death of the Father) into the Motives of lending to the Son, and to what purposes the Money was applied, that according to the Circumstances he may either support or null the Contract.

By the Divine Law Usury was forbidden amongst the Jews themselves, but not from a Jew to a Stranger, Deut. xxiii. 19, 20.

2. ⁿ A *Commodatum* (i. e. *cum modo datum*, a Loan to be used) is ⁿ I. 3. 15. 2. a Contract introduced by the Law of Nations, in which a thing is granted gratis, and without Reward to another for a certain Use, upon condition, that after the use of it, The same thing should be return'd in as good plight as it was when it was first delivered. ^o It may be either of Things moveable or immoveable, as of an ^o D. 13. 6. 1. House or Land. A *Commodatum* differs from a *Mutuum*, because here the same Person continues to be Owner, and because ^p the ^p D. 13. 6. same thing is to be return'd, and not of the same Quantity or Quality as in a *Mutuum*. Therefore Things that perish in the using are not *Commodata*. ^{8 & 9.}

They have different names in Latin, though not in English.

It differs from letting to *Hire* and *Hiring*, and from *Innominate* Contracts, because it is granted gratis, and without Reward; and it is distinct from a *Precarium* because that determines by the Death of the Owner, or by determination of his Will, and is not granted for a certain Use and may be recall'd before it is used at all; but in a *Commodatum* otherwise; for though it was free for you whether you would lend or no, yet having agreed to lend, you ought to perform the Agreement.

This Contract is of frequent use, and of absolute necessity in Society, for no one would buy or hire every day those things which he had occasion to use but a little time, and therefore by agreement Men will often supply each other upon such Urgencies.

^q They may not only lend what is their own, but what belongs ^q D. 13. 6. 14. to

ⁿ *Commodatum est contractus Juris Gentium, quo Res alicui ad certum usum gratis conceditur, ut finito illo usu eadem Res in specie restituatur.* I. 3. 15. 2.

^d D. 13. 6. 5. to other Persons. ^r The Person that lends has his Action for the returning of the thing lent, and for any great neglect committed about it, ^a for he may prescribe the Rules of using it; and if it is used in any other manner than agreed or intended, the Borrower must answer.

He to whom the thing is lent has his Action against the Lender for Damages, either because he recall'd the thing lent too soon, or because he lent him a thing that was vitious and faulty whereby he has suffered; as a Horse that was apt to kick, or ^a a Bondman given to stealing, of which he gave him no notice; or because he laid out necessary ^a Costs about it. So that here are mutual Actions and Obligations.

The Thing lent must be used for that purpose for which it was borrowed, ^a or He to whom the thing was lent shall be answerable for ^a Chances, tho' ^x inevitable. If the thing lent was employ'd only for that use for which it was borrow'd (tho' it is the worse for the wearing) the Borrower is ^y not liable, as in the case of an Horse borrowed to go to one particular Place; ^a but if there is any neglect, tho' never so small, in the Borrower, he ought to make amends for all Damages, because the Contract was made for his Advantage only.

Vide pag. 107. But see Exodus xxii. 14.

Sometimes the Borrower answers only for *Deceit* or the *Gross* Fault, when a Thing is lent for the ^a sake of the Lender; as when I lend you my Horse to attend me in my Journey, or Cloaths, &c. to make up my Equipage. Sometimes the Borrower shall pay Damages only for a small Neglect, as when the Lender and the Borrower jointly invite a common Friend to Supper, and he comes by the Invitation of both if one undertakes to manage Affairs, and the Plate is stolen which the other lent for this purpose, (if he was guilty of the smallest Neglect, and did not act as a diligent and discreet Man ought to act,) ^b he is to be charg'd with the loss. Such care is required of things lent, that if a Fire happens in a House, a Man ought to endeavour to preserve the thing lent to him ^c before his own Goods; for the nature of this Contract requires the most exact diligence.

Vide antea pag. 106. Concerning the Degrees of Negligence.

The Borrower must bear all necessary Charges by using the thing lent, as feeding or shoeing a Horse that is lent, but not for ^d curing any old Distemper which came without the fault of the Borrower. A Man ^e cannot detain what was lent under a pretence of Debt. 3. ^f *Depositum* is a Contract of the Law of Nations, by which a thing is committed to the Custody of one to be kept without Reward, upon Condition that the same thing shall be return'd when he that deposits the thing shall demand it. It often happens that Proprietors or Owners are under a necessity of leaving their Goods privately

^f *Depositum est Contractus Juris Gentium quo res alicui gratis custodienda relinquuntur, ut eadem deponenti, quandocunque illi lubuerit, restituantur.* D. 16. 3. 1. I. 3. 15. 3.

ly in the hands of Friends, either because of War, Fire, Tumults, &c. (in which sad cases the *Prætor* made the Depositary pay ⁸ *doub-⁸ D. 16. 3. 1. 1.*le for any Unfaithfulness) or upon Sickness, long Journeys, &c. and this often happens to be without exprefs Agreement; so that Natural Justice obliges them to Fidelity and Care. He that uses the thing deposited, was ^h guilty of Theft. ^h I. 4. 1. 6.

Vide postea, Of Theft.

And as it ought to be *used*, it distinguishes it self from *Mutuum* and *Commodatum*. It must be kept *gratis*, and return'd upon demand, and it may be either of things *moveable*, as of Money, Jewels, &c. or of things *immoveable*, as Houses and Lands.

If the thing *deposited* belongs to many Persons, it ought not to be delivered but when all the Parties are met together to receive it, if it cannot be divided. ¹ But if it may be divided, each one may ¹ D. 16. 3. 1. receive his part upon claim. If one only receives his part, and the ^{36. & 1. 14.} Depositary afterwards becomes insolvent, he that hath received his part shall not be forced to divide it in ^k common amongst the rest; ^k C. 4. 34. 12. for he alone ought to have the benefit of his care and diligence. The Depositary is not always obliged to return it to *him* that did deposite it, if he afterwards knows who is the real Master. ¹ For ¹ D. 16. 3. 31. if a Thief leaves the things stolen in his custody, He is under no Natural or Civil Obligation to restore it to him; but he ought to keep it safe till the title of it is determin'd. If there is no cause of suspicion, he ought to return it to the Person which did deposite it, ^m tho' he was not the true Proprietor. He ought also to return ^m D. 16. 3. 11. the Principal thing deposited, with the mean ⁿ profits which have ⁿ D. 16. 3. 1. accrued since it hath been in his custody. And this return ought ^{23.} to be in the same ^o place where it was first deliver'd. If any thing ^o D. 16. 3. 12. is deposited in a Cabinet, or under Lock and Key without shewing to the Depositary what it is, whether Money, Papers, &c. the Depositary in this case is only bound to return the Cabinet lock'd in the same manner as he receiv'd it, without being accountable for any thing which is pretended to be contain'd in it. But if the Depositary is inform'd with the particulars ^p contain'd in it, he must ^p D. 16. 3. 1. answer for every particular. ^{41.}

^q A *Sequestration* is a *Depositum* of a Thing in Controversy by two ^q D. 16. 3. 6. or more in the hands of a third Person, upon Condition that he shall keep it safe during the continuance of the Suit, and at the end of it restore it to the Person that has the Victory. This is contriv'd to prevent a multiplicity of Actions.

In this sense the word *Commendare* and *Commenda* is used as well ^r D. 16. 3. 24. as *Deponere* and *Depositum*.

It is either ^s *Voluntary* where the Sequestrators are named by the ^s D. 16. 3. 17. agreement of the Parties, or *Necessary*, when it is directed by the Magistrate.

The just causes of *Sequestration* by the Magistrate, are fear of
K k k Dilapi-

^a *Sequestre est Depositum quod à pluribus in solidum certâ conditione custodiendum reddendum-
que traditur.* D. 16. 3. 6. D. 50. 16. 110.

ⁱ *Commendare nihil aliud est quam deponere.* D. 50. 16. 186.

^t D. 49. 1. 21. ^t *Dilapidation* or Destruction, suspicion ^u of flight, (especially in him that hath no immoveable Estate upon the place) or for *Contumacy* in not appearing upon Citation.

By the Canon Law a Man or Woman may be put under Sequestration and Custody, when there is a Controversy or Suit depending, whether he or she is married to that Person who commences the Suit; and this is done lest the Defendant should Marry any other in the mean time. c. 14. X. De Spons. & Mart.

^w D. 2. 8. 7. 2. For the most part if ^w Caution or Security is given, the Judge ought to relax the Sequestration and restore all to its first state.

The Previous Requisites to a Necessary Sequestration are Citation, Proof of the Debt or Right, proof of Danger that you shall probably lose your Right if a Sequestration is not granted, a summary enquiry into the cause, an oath of Calumny, &c. Indeed a Judge ought not to be forward in it, ^x for 'tis a sort of Execution, with which a Suit regularly ought not to be begun.

The Office of the Sequester (or of the Person in whose hands the Thing is deposited) is to preserve the Thing safe during the Suit, or to sell those Things that will otherwise perish, to give an account of the Sequestration at the end of the Suit, and (if the Party cannot subsist otherwise) to allow him Aliment out of it, and the costs to carry on the Suit, if the thing sequestred will bear it.

Also a *Depositum* may be when a *Wager* is put into the Hands of a third Person upon an Agreement to play for Money, by throwing the Spear or Dart, by running, leaping, wrestling, &c. In which cases playing for Money was allowed; but where the Game was not for corporal Exercise, or trials of Strength, or of use in War, ^z then playing for Money was not permitted, and all Securities for the same were made void; except when ^a rich Persons play'd for very small Sums.

^z D. 11. 5. 2.

^a C. 3. 43. 1.

^b Ibid.

And if any Money was paid, the Loser or his Heirs might ^b sue for it again, or the Governour of the place where it was lost might claim it to be expended in some publick Work.

Vide 33 H. 8. c. 9. 16. Car. 2. c. 7 & 9 Ann. ch. 14.

The Depositary ought to return the thing deposited, and pay only for the Damages committed through ^c Deceit, or a gross neglect; for it was designed to be no advantage to Him, but rather a burthen. As to a ^d small neglect, he that deposited may complain of his own easiness and inconsideration, that he should put a Trust in a Person that was not so circumspect as he intended.

^c D. 50. 17.

²³

^d D. 44. 7. 1.

⁵

Vide ante p. 107. But see Dr. & Stud. Dial. 2. c. 38.

^e D. 16. 3. 5. However he that deposited ought to pay the ^e Charges of the Custody, and all other Expences.

4. *Pignus* (a Pledge) is sometimes taken for the Thing given in Pledge, sometimes for the Obligation, and the Right which arises from it, and sometimes for a Contract. A pledge creates a Contract by the

the Law of Nations, in which ^f a Thing is given by the Debtor to ^f I. 3. 15. 4. the Creditor for Security of his Debt, upon condition that when the Debt is paid the same thing in specie should be return'd. Trade cannot subsist or continue without Pledges, for amongst Merchants Men are only valued and trusted according to their Riches and Stocks: And tho' the Trader is a Man of Sincerity and Integrity, yet good Intentions cannot always be sufficient Security.

^g *Pignus* and *Hypotheca* are said to differ in name only, yet properly speaking *Pignus* is of things moveable; *Hypotheca* of things ^g D. 20. 1. 5. immoveable, as Houses, Lands, &c. It is the nature of a *Pignus* that it should be deliver'd (^h *Pugno*) by the hand to the Creditor, and ^h D. 50. 16. the nature of ⁱ *Hypotheca* that a Right only in the Houses and Lands ^{238. 2.} ⁱ I. 4. 6. 7. should be assign'd, the Debtor himself still remaining in possession.

It may be of Things ^k *Incorporeal*, as of Debts, Actions, and ^o ^k C. 8. 17. 4. ther Rights;

This is otherwise in the Laws of England; for a Chose in Action cannot be transferr'd. Vide post. Of Actions.

And of Things *Corporeal*; Of Things *Moveable* as well as *Immoveable*.

But the inconvenience is so great as to moveable Goods, that in France, and in other Foreign Countries at this Day they are no longer a Pledge than they remain in the custody and power of the Creditor. Loix Civiles, &c. Tom. 2. Lib. 2. Tit. 1. § 1. Groenweg. de Legibus Abrog. in Cod. Lib. 4. Tit. 10. l. 14.

A Pledge is either 1. *Express*, or 2. *Tacit*.

Express is either *Necessary* by the ^l Decree of the Magistrate; ^l C. 8. 22. 1. when after Action commenced, Execution is taken against the Estate after the Sentence.

In England the Lands are affected from the time of signing the Judgment, the Goods from the time that the Writ of Execution is deliver'd to the proper Officer. 29 Car. 2. cap. 3. And in France all the Estate is bound the day of the Judgment or Sentence if there is no Appeal. Art. 53. del Ordon. de Moulins 1566. Loix Civiles, &c. Tom. 2. Lib. 3. Tit. 1. § 2. And even Promises under Seal bind the Estate as a Pledge upon Default after Demand, or Suit contested. Art. 92. & 93. del Ordon. 1593. Ibid.

Or *Voluntary* by ^m consent of Parties, which may be performed ^m D. 20. 1. 4. without Writing before ⁿ three honest Witnesses, and without being ⁿ C. 8. 18. 11. acknowledged before a publick Officer; so that Debtors hence have taken occasion to antedate the Mortgages of the later Creditors.

Therefore in France, Holland, &c. Mortgages are always made in Writing before Notaries or publick Officers. Loix Civiles. &c. Tom.

^f *Pignus est contractus Juris gentium, quo res aliqua à Debitore Creditori datur in securitatem Debiti, ut soluto debito eadem Res in specie restituatur. — Fructus Rei est vel Pignori dare licere. D. 50. 17. 72.*

Tom. 2. Lib. 3. Tit. 1. § 2. Groenw. In Inst. 4. Tit. 6. § 7. *And in England by Writing when Lands are Mortgaged.* 29. Car. 2. cap. 3. *but not of necessity to be Registered or Engrossed before an Officer, unless it is a Bargain and Sale of the Freehold.* 27. H. 8. cap. 16.

Tacit Pledges are made so by the Law, and are call'd *Pignora Legitima*. The Commonwealth hath such Security in the Estates of all Men for the payment of the publick Taxes, and the Exchequer has a Pledge in the Estate of all those who are Officers accountable to it, as Farmers and Collectors of the Revenues; so has the Wife in the Estate of her Husband for Security of her Portion, the Proprietor in the Goods of his Tenant (brought into the House, or upon the Farm) for Rent, but not in the Goods of an under-Tenant, for there was no Contract between them and the Proprietor.

In England regularly the Goods upon the Estate are liable to Distress, whether they belong to the Tenant or no. See 2 W. & M. Sess. 1. c. 5. & 8 Ann. ch. 17.

A Pledge may also be 1. *Simple*, and 2. *Privileged*.

Privileged Pledges are where Creditors have preference before other Creditors. As when one lends Money to build an House, or to repair it (which is afterwards Mortgaged) the Lender shall first of all be paid his Money, and the House shall stand security for it.

This is not Law in England.

There are three sorts of *Creditors*. 1. Creditors upon *Promise* (in Writing or without it) when Priority of Obligation is not concern'd. 2. Creditors upon *Simple Mortgage*, amongst whom Priority of time regularly gives the right. 3. Creditors that are *Privileged*.

A *Privileged Creditor* may have preference over the whole Estate before other Creditors (but not before Creditors upon Mortgage) tho' Prior in time. Such is a Debt for Funeral Charges, which ought to be allow'd according to the Character and Condition of the Deceased, because it is an Expence of necessity. Also the Costs of *Administring* the Estate of the Deceased; for that Expence is for the sake of all the Creditors. Or this preference of Debt may regard one particular thing only, as when Money is lent to repair Houses; for it concerns the Commonwealth to encourage beautiful Buildings. Architects and Workmen enjoy this privilege upon the same reason for their Materials and Work. Here the Cause of the Debt ought to be consider'd, not the time of the Contract.

I do not remember this distinction in the English Laws.

Proprietors also of an House or Land have this preference over the Goods of their Tenants lying upon the Estate for their Rent. Those Goods which are brought upon an Estate only for some time by way of Trading are not subject to such a seizure.

The

The ^z *Exchequer* hath no Privilege of a Mortgage amongst Creditors, but claims only in order, unless in Goods, or an Estate acquired by the ^a Debtor or Officer of the *Exchequer* after the Obligation was enter'd into. Where there is no Mortgage, but a Simple Debt, the ^b *Exchequer* is to be preferr'd, for that has always a ^b *Tacit Mortgage*. C. 7. 73. 2.
D. 49. 14.
28.
D. 49. 14.
46. 1.

In Florence he that hath a Pledge or Mortgage, has no privilege or preference before other Creditors by Writing. Ansaldo de Ansaldo de Commercio, &c. Discurs. 13.

A Pledge may be likewise, 1. *General*, or 2. *Particular*.

In a *General* Pawn or Mortgage of all one's Goods and Estate, Things directly necessary for the support of Life do not pass, as wearing ^c Apparel, Bedding, &c. for it is a loss to the Publick if ^a ^c *any one is useless*. D. 20. 1.
6 & 7.

See Exodus xxii. 26. Deut. xxiv. 6. & 17.

But the Goods to be acquired ^d *hereafter* may be Pawn'd, as ^a ^d *Corn in the Ground, the Young in the Body of the Cattel.* ^e *And* ^e *a Pawn of all Goods shall thus extend to future Acquisitions, tho' not mention'd by any distinct Agreement.* Yet if one Engages his Goods for Money which he shall borrow *hereafter*, the Obligation is void; for the Pledge is accessory to the Obligation already made. ^f *And if such Bargains were permitted, it would be easy to defraud* ^f *Creditors by an Agreement of this nature.* D. 20. 1. 15.
C. 8. 17. 9.
D. 20. 3. 4.

If a *Particular* Thing is Pawn'd, every Thing that is the ^g *product or part of it, is under the same Obligation, if it continues in the same State, and is of the same nature.* But if a Wood is Mortgaged, and the Debtor builds a ^h *Ship with the Timber of it, the* ^h *Ship is not part of the Pawn; for the Ship is one thing and the* ³ *Timber different from it.* A Clause may be inserted to comprehend it. And tho' Corn in the Ground, and the Profits of the Land Mortgaged are part of the Mortgage or Pawn, yet *other* Lands bought with the Money arising from those Profits, are not under that Obligation, ⁱ *for those Lands are not part of the thing in* ⁱ *Mortgage.* D. 20. 1. 13.
D. 13. 7. 18.
C. 8. 15. 3.

A Pledge may not only be applied for the Security of a Creditor, but may be added ^k *to other Obligations.* D. 20. 1. 5.

If the ^l *Pledge hath been given to two several Persons for several Debts at the same time, he that gets the first possession hath the best Title.* If the Pledge was given at ^m *several times, he that is* ^m *first in time hath the best Title.* And if the Debtor hath not sufficient to pay the second Debt, the Creditor may ⁿ *prosecute him* ⁿ *for the Crime of* ¹ *Stellionate or Fraud, because he did not give him* ¹ *notice of the precedent Mortgage.* D. 20. 1. 10.
C. 8. 18. 8.
D. 13. 7. 36.

By the English Law, if the Debtor does not give notice in Writing of the first Mortgage to the second Mortgagee, he shall have no equity

L I I

^b *Fiscus semper habet Jus Pignoris.* D. 49. 14. 46. 3.

equity of redemption against the second Mortgagee, but shall lose the whole. 4 & 5 W. & M. cap. 16.

^oD. 12. 1. 28. But if there is Estate enough in other Goods, he may ^orecover his Debt by Action.

^qC. 8. 27. 1. The ^pPledge may be retain'd not only for the Debt for which it was given as a Security, but till other Debts are paid to the same Creditor by the same Debtor:

In this Contract it is often agreed between the Debtor and Creditor, that the Creditor should have the profits of the Thing pawn'd or Pledg'd for the Interest of his Money, which is call'd *Pañum* ^q*Antichreseos*; and sometimes it is agreed between them, that if the Debt is not paid within a certain time, the Pledge should be absolutely forfeited, which is called *Pañum Commissorium*; for *Committere* sometimes signifies as much as *Delinquere*. This agreement

^rC. 8. 35. 3. is ^tforbidden that cruel Creditors should not take advantage of the necessities of poor Debtors. But if the Debtor makes any longer delay to pay the Debt, the Pledge may be sold by authority of the Judge (^s whether the Debtor is in possession or not) after ^t two Years notice given to redeem it; and then the Debt being paid by the Sale, the overplus must be return'd to the Debtor. But if a Chapman cannot be found, new notice must be given to the Debtor to redeem, or the Pledge it self will be adjudged to the Creditor. ^uIf the Creditor afterwards shall receive a part of his Debt or Interest, he seems to have open'd the Decree, and to have released that Sentence. However even after such Decree, if the Debtor shall come within two Years, and offer the Debt with Interest and Costs of Suit, the Judge will order the Pledge or Mortgaged Estate to be restor'd to him.

^wHe that hath the *Prior* Title may follow and recover the possession against all Men, and the second ^xCreditor can receive nothing till the first is paid his principal Money, ^yInterest, and Costs. ^yD. 13. 7. 8. The ^zsecond Creditor may buy off the first and confirm or *protect* his own Title, but the first is under no necessity to buy out the second. ^zC. 8. 18. 5. The first Creditor may sell the Pledge for defect of payment, ^a whether there was any agreement to sell it or not: for it is the nature of this Contract, that the Creditor should be paid out of the thing Pawn'd, if the Debtor fail'd to do it. This may be done without the authority of the Judge after the third notice to redeem.

By the Custom of England, the Creditor cannot sell the Pledge by his own authority, or without the consent of the Debtor, or Decree of the Judge. And so it is in France. Loix Civiles, &c. Tom. 2. Lib. 3. Tit. 1. § 3. Art. 9. & 10.

^bC. 8. 26. 6. When the Estate is to be sold, if the ^bother Creditors have notice of the Sale, and do not make their claims upon the over-plus, they seem to have lost their right of Mortgage upon it.

^cD. 13. 7. 35. The ^cfirst Money which is paid to the Creditor shall be interpreted in discharge of the *Use* and *Interest*, and last of the Principal; for

^b Creditor qui permittit Rem venire, Pignus dimittit. D. 50. 17. 158.

for it is reasonable that the Creditor should be first paid his Damages for the delay of Payment. *Moveables* are first to be sold, and if they are not sufficient to pay the Debt, then the *Immoveables* may be exposed to Sale. ^{d D. 42. 1. 15. 2.}

This Order is seldom or not at all observ'd. Groenw. de Legibus Abrogat. in Lib. 42. Dig. tit. 15. l. 2.

The Creditor and Debtor may agree; that if the Money is not paid at a certain time, the Creditor shall possess the Thing pawn'd by way of Sale, at a certain and just price.

The Creditor whilst he is in Possession must not only answer for all Losses and Damages, but for those things which happen'd by his Neglect, and not by an inevitable Accident. The Creditor ought not to use or employ the thing pawn'd, without the consent of the Debtor, for it was deliver'd to him for his Security, not Use. ^{e C. 8. 34. 3. f D. 50. 17. g I. 3. 15. 4. h D. 47. 2. 54.}

Upon payment of the Debt, the Creditor and his Heirs are always under an Obligation to restore the Mortgage, for the Creditor cannot acquire a Title by an Ordinary prescription. He must also give an account of the profits receiv'd. ^{i C. 4. 44. 10. & 12.}

On the other hand the Debtor must make the Creditor allowance for necessary Expences laid out upon the Mortgage, as for repairs on Houses, tho' afterwards burnt down by accident. But as for Improvements, it depends much upon the Circumstances of it, whether the Debtor ought to allow them. ^{k D. 13. 7. 8.}

Subrogation or *Cession* is putting another Person into the Place and Right of the Creditor. It may be done *gratis*, or for Money. And the Cessionary or Assignee shall succeed in the room of the Creditor, and exercise all manner of rights in relation to the Mortgage or his Privilege. Thus a Debtor may borrow Money to pay the Creditor, and by consent That Creditor may assign over the Mortgage for his Security to the Lender, reciting that the Money was paid by him. This is no prejudice to other Creditors, for their condition is neither worse or better for such Change and Assignment. These Assignments and Subrogations may be also by the authority of the Judge, with the consent of the Creditor. If the Creditor consents that his Pledge shall be assigned to another, he hath remitted his Right; but bare notice and silence cannot amount to consent, as when he knows that his Debtor is selling Land that was Mortgaged to him, and says nothing against the Sale. This consent ought to appear by some External Act, as when one Mortgages Land a second time, and declares that it is free from all Incumbrances, and the first Creditor signs the Deed either as Party or Witness; he is an accomplice in the Fraud, and the Circumstances are so gross that it must be esteemed to be done with his consent. ^{l D. 18. 4. 6. m D. 20. 3. 3. n C. 8. 22. 1. o C. 7. 73. 7. p D. 20. 6. 8. q D. 20. 6. 9. 1.}

Thus you may distinguish a Pledge from other Contracts which arise from the Thing done. For *Mutuum* and *Commodatum* suppose the Use of the Thing, and are for the sake of the Receiver only. A *Depositum* is for Custody, and for advantage only of the Person that does deposit. A Pledge is only for Security of a Debt, for the advantage both of Creditor and Debtor. From these Observations you

you may also judge how far each Party is to be answerable for any fault or neglect committed in either of these Contracts, according to the Rules before mention'd.

Vide antea. Of an Humane Act, pag. 107.

C H A P. III.

Of Contracts by Words, and therein of Stipulation and Sureties.

BY Words an Obligation arises, and is termed *Verborum Obligatio*, which may comprehend *Stipulation* and *Sureties*.

* I. 3. 16. pr.

* I. 3. 16. 1.

1. *Stipulation* is derived from * *Stipulum*, which the Antients interpreted to signify *firm*. * It was invented by the *Civil Law* (and not by the *Law of Nations*) and it is made by a *Question asked*, and a fit *Answer presently made to it*. For no other Business must intervene.

In this Contract there is an Action and Obligation only upon one Side. The Words must be *spoken* not *written*, which is not necessary in other Contracts: Heretofore the Words were *formal* and *solemn*, that Men might not be surprized by light Promises; but since the Constitution of *Leo*, that Solemnity is not required.

The *Stipulator* is the Creditor, and is called the *Reus Stipulandi* or *Credendi*, and the *Promiser* is the Debtor, called *Reus Debendi* or *Promittendi*; for the *Res* or Affair of both is transacted,

Though now of late the Defendant is only call'd *Reus*. See the Notes Book IV. c. 1.

* I. 3. 16. pr.

u § 2.

w D. 50. 17. 186.

x § 3.

y § 7.

Stipulation or the Contract by Words, may be of a Thing * *certain* or *uncertain*, u *absolute* without Condition, or Day annexed, or upon Condition, and at a *certain Day*; w where the whole Day must be past before any thing is payable, though due at the time of the Contract. And if a Day is added, as the morrow after the Day of Judgment, (which can never come to pass) the Debt is presently due. Or at a *certain* * *Place*, where sufficient Time must be allow'd for the Journey. It may consist in y *giving* or *doing*; under which not doing ought to be comprehended; to which it would be convenient to add a Penalty, that the Creditor might not be obliged to prove his particular Damage.

z I. 3. 17.

a § 1.

The *Stipulation* may be from z *two* to *one*, as in other Contracts, and a a Payment to one is sufficient, or two or more may be engaged as Debtors to one; and though each is engaged for the whole, yet all are obliged but to one Payment. Every one is not engaged for the whole, unless it is so expressed.

But

* *Verborum obligatio seu stipulatio est contractus Juris Civilis qui præcedente Interrogatione & subsecuta statim Responsione congrua perficitur.* I. 3. 16. pr.

z *Cum solvendi Tempus obligationi additur, nisi eo præterito peti non potest.* D. 50. 16. 186.

But some *Contracts by Words or Stipulation* are void and *ineffectual*, as

1. When there is a *Defect in the Persons*, which may be when the *Promiser* is a ^b Madman, Deaf and Dumb, an ^c Infant under seven Years of Age, a ^d Minor under five and twenty, ^e a Prodigal. Those indeed that are supposed to have any Understanding may make their Condition *better* by Stipulation, but cannot oblige themselves by *Promise* to make it worse.

By the Laws of England a Prodigal is in the same State with other Men, and a Minor may be bound by Promise in some Cases,

1 Inst. 172, a. 'There is also a Defect in the Person, where one stipulates for another, not for himself; which cannot be done by the Roman Law, though it is good according to the Canon Law and Custom. Groenw. in Inst. Tit. 20.

2. When there is some *Defect in the Thing* promised; as when it is not and cannot be in *Rerum Naturâ*; or when the Thing is not in *Commerce*; or when the Fact of ^h another Man is promised; unless the Promiser says that he will take care to effect it as far as in him lies; for then he promises his own Fact;

But this seems to be implied in the general Promise at first, and so it is understood in Practice. Groenw. de Legibus Abrogat. in Instit.

3. Tit. 20. § 3. Therefore such a Promise for the Fact of another is good, as it is just and reasonable. Idem. §. 19.

ⁱ Or when one stipulates to have what is his own already; or when a ^k dishonest Action is promised, though confirmed with a Penalty or Oath, &c.

3. When there is some Defect in the ^l Form the Stipulation is ineffectual; as when it is not done by Words, between Persons present at one and the same Time; ^m or if the Answer is different from the Question, either in Quantity or Quality, when the *Stipulator* and *Promiser* speak of the same Thing, but ⁿ differ in their Meaning. A ^o Preposterous Stipulation is not void, as if you speak thus, viz. If the Ship comes from the *Levant* to morrow, will you give me a hundred Pounds to day; For the Intention of the Parties may be understood.

Effectual Stipulations may be either ^p Judicial by the Authority of the Judge,

Which are of Use at this Day.

or *extrajudicial* by Consent of Parties. And these are of several sorts, for every Contract in Writing may have Stipulation added to it, though that is not necessary, as it is in *Contracts by Words*.

Also Stipulation may be reduced to ^q Writing for Memory sake;

M m m

^a In omnibus Rebus quæ Dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium. D. 44. 7. 55.

and thus being added to the Contracts of the Law of Nations, it gave a greater Strength and Confirmation to them.

The Word Stipulation is now daily used, but it differs nothing at all from common Covenants, whether Nude, or upon Cause or Consideration. Vinnii Com. in Instit. Lib. 3. tit. 16. § 1. n. 4. But when the Word Stipulator or Stipulation is used amongst us, it for the most part means the Promiser, or the Act of the Person oblig'd, not of the Creditor as heretofore. And some affirm that the Word antiently was common both to Creditor and Debtor. Calv. Lexicon. v. Stipulari.

II. That Stipulation and Promises may be more certain, *Caution* and *Sureties* may be added to them.

- * I. 3. 21. pr. & 1. * *Fidejussor* (a *Surety* called otherwise *Repromissor*, *Adpromissor*, *Sponsor*, *Prædes*, *Vades*) is he that obliges himself in the same Contract, with the Principal for the greater Security of the Creditor or Stipulator. He differs sometimes from * *Expromissor*, for this discharges the first Debtor, and takes the whole Burthen upon himself; and *Fidejussio* differs from *Constitutum*, because this is a * Promise for a Debt upon a Nude Covenant without Stipulation.
- * D. 12. 4. 4.
- * I. 4. 6. 9.

It is made a Question, whether our Saviour was Fidejussor or Sponsor only or Expromissor for the Fathers under the old Testament.

- * I. 3. 2. 21. 1. A *Surety* may be allowed in all * *Civil* and * *Criminal* Cases, provided he is not engaged farther than in the Penalty of a Sum of Money, and not Body for Body in a Crime that deserves Death, as in the Case of *Hostages*. Therefore if the Crime is apparent, and of a very high Nature, *Sureties* ought not to be taken. Those that commit Crimes by the Order of other Persons, or are Accomplices with them, cannot be * indemnified by *Caution* or *Surety* from the Consequences that will attend such ill Acts; neither is any Obligation valid if it is given to divide the Profits of such illegal Agreements.
- * D. 46. 1. 70. 5.
- * I. 3. 21. 2. The Obligation of the *Surety* binds his * Heirs, though no Mention is made of them; and so it is in all Contracts, whether proper or improper.

Otherwise in the Laws of England, if the Word Heir is taken in our Sense, for he is not bound in an Obligation, if not named; but an Executor is bound that is not named in the Obligation. 1 Instit. 209. a. 210. b.

- * I. 3. 21. 4. If there are more *Sureties* than one, each of them is bound in * *Solidum*, whether it is agreed to or not; but by later Law they are allow'd three Advantages, viz.
- * 1 Nov. 4. c. 1. I. *Beneficium* * *Ordinis* sive *Excussionis*, which is a Right by which the *Surety* can by way of Exception force the Creditor to sue

* *Fidejussio est Verborum Obligatio quâ quis alienam Obligationem in Fidem suam suscipit, ita ut Debitor principalis maneat obligatus.*

sue the principal Debtor before he shall recover against him as the Surety; except the Surety was given judicially in a Cause depending; for Execution ought not to be deferred.

2. *Beneficium^b Divisionis*, which is a Right by which the Creditor shall be forced by Way of Exception to sue each Surety for their Share and Proportion, especially when the rest of the Sureties are under the Jurisdiction of the same Judge, and able to pay it.

3. *Beneficium^c Cedendarum Actionum*, which is the Right of one Surety, sued for the whole Debt, to force the Creditor by Exception to assign over his Actions against the rest of the Sureties, or else he shall not force him to pay the Debt.

This is not allow'd in England, but the Creditor may sue the Security in Solidum, being under no Obligation to yield these Advantages. It is a Maxim in our Common Law, that an Action cannot be granted over, for so, under Colour thereof, pretended Titles might be granted to great Men, and Right oppressed. 1 Inst. 214. a. Vide post. Of Actions. But by particular Statutes it is otherwise in some few Cases.

But if the Surety does renounce these Advantages (as was usual) he cannot have the benefit of them.

^d The Surety cannot be bound in a greater Sum, or constrained to less Time, &c. than the Principal. If he is engaged in a greater Sum, the *Stipulation* is valid only so far as it equals the Principal; though ^e others contend that it is void. If the Surety pays the Debt, he has his Action against the Principal, but not before, and if the Principal pays the Debt, the Surety is released according to the Nature of all Accessories. If the Surety is in ^f Peril, he may sue before the Time of Payment to be indemnified or discharged;

Not by the Laws of England.

but if he pays before the Time, he cannot recover the Payment of the Debtor, before the time of payment to the Creditor is expired; for he ought not to make the Condition of the Debtor worse than it was at first. But ^h after the Term is expired he may pay the Debt before Action brought against him. If the Surety being prosecuted by the Creditor makes an ill Defence, and is cast for want of good Management of his Cause, it ought to be judged according to the Circumstances of the Matter, whether he shall recover his Costs of Suit of the principal Debtor.

If there is no personal Security, a Creditor may have a ^k *Juratory Caution*, or Security by way of a ^l *Pledge* from his Debtor.

All Persons may be Sureties, except ^m *Minors*, by reason of their age, ⁿ *Soldiers* that they may not be detain'd from the Wars;

In England, France, Holland, &c. Soldiers are allow'd to be Sureties. Groenw. de LL. Abrog. in C. 4. 65. 31.

and ^o *Women* because of the Privilege given them by the *Senatus-Consult. Velleianum*, unless they renounce the benefit of it.

In

¹ Plus Cautionis in Re est quam in Personâ. D. 50. 17. 25.

In England unmarried Women may be Sureties, but married Women cannot. There was formerly a Custom in Germany to give Surety or Bail, sub obſtagio, where the Fidejuſſors promiſed that if the Debtor did not pay at the time appointed, that they themſelves would come and meet the Creditor at a certain place, and not depart till he was ſatisfied. This amounted to a ſurrender of themſelves to Priſon. And the Debtor might Covenant to oblige himſelf to that ſurrender. But this is now aboliſhed and made void, and is no where uſed in Germany, unleſs in the Dukedom of Holſtein. Gail. Lib. 2. Obſ. 45. Conſt. Rensburg. 1630. 1 Oct.

CHAP. IV.

Of Contracts by Writing.

¶ I. 3. 22.

BY Writing alſo there may be a Contract call'd *Literarum Obligatio*, as when one, upon hopes and expectation of having Money paid down, or other thing delivered, confeſſes by Writing under his hand that he is indebted or has received Goods, whereas really the Money was never paid, nor the Goods delivered.

This is common amongſt needy Perſons who are haſty to borrow; but if the Money was really paid, it is a *Mutuum*, and the Writing there (as in other caſes) is drawn only for proof. This Contract ſubſiſts from the Writing only. It is therefore a miſtake if you think that all Contracts reduced to Writing are treated of in this place.

¶ Ibid.

¶ C. 4. 30. 10.

This Contract by Writing obliges in ſtrictneſs; ¶ but if the Debtor comes within two Years after the date of it, and pleads that the Money was never paid, or Goods deliver'd, the Creditor muſt prove the payment or delivery contrary to the common rule, viz. That every Man ought to make proof of his own plea. But after two Years are elapſed, That exception, unleſs in the caſe of a Minor, ought not to be admitted, except the Debtor will take the proof upon himſelf. For this reaſon it is ſaid to be an Obligation ariſing from Writing, tho' it differs very little from a *Mutuum*; the preſumption after that time being againſt the Debtor, that he really did receive the Money, becauſe he has own'd it under his Hand.

By Cuſtom amongſt Merchants and Traders, the note in Writing is ſufficient, there being no neceſſity to make the Creditor to prove the payment. Groenw. de Legibus Abrog. in Cod. Lib. 4. tit. 30. The Law of England allows more validity to Contracts in Writing than the Civil Law, and will ſcarce admit of an exception that the Money was not paid, becauſe the Debtor has acknowledged it under his hand; eſpecially where it is a Bond or a Deed: A Deed is an Instrument

¶ *Literarum Obligatio eſt Scriptura, quâ Debitor ſpe futurae numerationis ſcripſit ſe accepiſſe pecuniam, quam reverâ non accepit.* I. 3. 22.

¶ *Factum adſeverans Onus ſubit Probationis* C. 4. 30. 10.

Instrument consisting of Writing, Sealing, and Delivery, Comprehending a Contract between Party and Party. So that a Deed is more General than Literarum Obligatio; and a Deed is not so called by the Civilians, as is affirmed in 1 Inst. 171. b. The necessity of the Delivery of a Deed seems peculiar to the Laws of England.

CHAP. V.

Of Contracts by Consent, and therein of Buying and Selling, Letting to Hire and Hiring, Emphyteusis, Partnership, Authorities or Commissions.

THE fourth sort of Nominate Contracts are by Consent.

See ch. 2. p. 221.

* Consent only (without any thing done or deliver'd, or Stipulation^{I. 3. 23. 1.} by words, or without Writing) may make a Contract. For it may^{& 2.} be made amongst Persons absent, by Letter or Messenger. Consent is required in other Contracts, but here Consent alone can finish it. This Contract by Consent is divided into five Branches, *Emptio-venditio*, *Locatio-Conductio*, *Emphyteusis*, *Societas*, *Mandatum*; and all (except *Emphyteusis*) are the contrivance of the Law of Nations.

I. * *Emptio-venditio*, Buying and Selling is a Contract by Consent^{I. 3. 24. pr.} only, introduced by the Law of Nations, whereby the Seller is bound to deliver the Goods, and the Buyer to pay a price for them.

Inconveniencies attending^{D. 18. 1. pr.} Exchanges. It was difficult to supply what was desired on both sides, the value of each Commodity created Controversies, and the carriage of great weights was chargeable.

Therefore no wonder, that the use of Money is very ancient. Gen. xxiii. & xlii.

This Contract is made by Consent only; so that the Seller is bound to deliver the Goods and the Buyer to pay the Price; which is the publick Money composed of different stated values, that it may be applied as a recompence for all things. Observe that it is a Contract before the Goods are delivered, or any price paid, or before any thing is given in earnest; That is, each Party is oblig'd to perform what he promised; tho' it is complete by performance. It subsists only by Consent; which may be expressed by Words and Signs, and it may be agreed that the Bargain shall be put into Writing for proof sake. * After Consent and Agreement upon the price^{I. 3. 24.} of the Goods, the Seller cannot avoid the Contract without the

N n n

Consent

* *Emptio-venditio est contractus Juris Gentium solo consensu initus, quo venditor obligatur ad Rem tradendam & emptor ad pretium dandum, I. 3. 24.*

Consent of the Buyer, nor the Buyer without the Consent of the Seller, tho' he would lose his *Arrha* or Earnest; for an *Earnest* is only given as a token or ^x proof of the Contract, and ought to be returned again after the price is paid; or else it ought to be made part of the price. But if the Buyer gives something in Earnest that he will *hereafter* be the Chapman, he may ^z refuse to perfect the Agreement with the loss of his Earnest, or the Seller with the loss of twice the value of it. For if the Agreement was perfect before, it cannot be rescinded but by a ^a mutual Consent.

This is observ'd in practice, except in France, whereby losing the Earnest, the Buyer may break off the Contract, Groenw. de LL. Abrog. in Cod. 4. 21. 17. See the Notes p. 237.

Three things are necessary to the Substance of this Contract, Consent, Price, and Goods.

1. Consent is destroy'd where there is *deceit, force or mistake.*

As to *deceit*, it ought to be consider'd whether it appears in the very Contract it self, or whether it was the *cause* of the Contract. If Deceit was the ^b cause of the Contract and the inducement to it, the Contract is void. If it was in the Contract it self (by buying too dear or too cheap) it is not void, but may be made void by Action or Exception. Thus if the faults or defects of the thing sold (moveable or immoveable) are concealed by the Seller from the Buyer, there may be ^c *Redhibitio*, *i. e.* the Contract may be rescinded; and the Seller must have his Goods again with the profit of them, and must make amends for Damages by reason of those faults, which if the Buyer had known he would not have bought at all; but provided that the Seller knew and concealed those faults. If the Seller was ignorant, the Goods may be return'd; but he shall not answer for the Damages occasion'd by them; no, tho' he commended his Goods in general Terms. Also there may be *Quantitas Minoris*, *i. e.* ^e so much of the Price may be return'd as the thing sold is the less in value for such faults, which if the Buyer had known he would not have given so great a price. For tho' the Law permits Circumvention as to the Price, yet it does not allow Circumvention at all, by ^g equivocating or concealing the faults. In living Creatures the faults must be so ^h considerable as to lessen the Service and use of them, and such as were secret and inward, not such as were apparent, and which the Buyer knew, or might have seen; ^k such faults the Seller is not bound to express, for they express themselves. Here he may magnifie his Goods for the contrary qualities. And tho' it is to be wished that there was more sincerity in Traders, yet this sort of Cheating must be tolerated, because of the Great inconveniencies to the publick, if all Bargains should

^x Quod Arrhæ nomine datur Argumentum est Emptionis-venditionis contractæ. I. 3. 24. pr.

^d Nulla est Venditio, si hoc ipso, ut venderet, circumscriptus est D. 4. 3. 7. Dolus malus est omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum Alterum adhibita. D. 4. 3. 2. Si duo dolo malo fecerint; invicem de dolo non agent. D. 4. 3. 36. Dolus bonus est solertia. D. 4. 3. 3.

^f In Pretio Emptionis & Venditionis naturaliter licet contrahentibus se circumvenire. D. 4. 4. 16. 4.

should be made void, which are not built upon exact Truth and Justice.

Therefore in England, and France Concealments and Circumvention do not make the Contract void; and the injured Persons have no Remedy. I Instit: 102. a. Groenw. de Legibus Ambrog. in Dig. 19. 1. 13.

Force and Fear make not the Contract void; but the ¹ *Prætor* C. 4. 44. 1. may give Relief against them, unless a forced Sale was made where the good of the Publick did require it. For upon urgent Occasions ^m Husbandmen may be forced to bring their Corn to the publick Markets. ^m D. 50. 11. 2.

In France and Holland, Husbandmen ought not to sell their Corn any where but in the publick Markets. Groenw. de LL. Abrog. in Dig. 18. tit. 1. l. 78. Vide the English Stat. 5. & 6. Ed. 6. chap. 14.

So if a ⁿ publick Road is destroy'd by breaking in of the Sea, &c. ⁿ D. 8. 6. 14. the adjacent Estates shall be *compell'd* to supply the publick Necessities. ¹⁰

^o *Error or Mistake* in the *Body* of the Thing sold, renders the ^o D. 18. 1. 92. Bargain also void; as when one Thing is pretended to be sold, and another is intended to be bought, as Brass instead of Gold; but it is otherwise if the Error is in the Quality or ^p Goodness of it, or ^p D. 19. 1. 21. in part of it only as before observed. ²

Vide antea of *human Acts*, page 103:

2. The *Price* ought to be ^q real and certain, and paid in publick ^q D. 50. 17. 16. Money, for if it is in Bullion, it is rather Exchange. Both the Par- ^{I. 3. 24. 1. &} ties must settle the Price, for if the Determination of the Price is referred to ^r one of them, it is void; or certain Arbitrators (to whose ^r D. 18. 1. 35. Decision they must stand) may adjust it, unless it is very partial; for ¹ then the ^s Judge will rescind it. ^s C. 4. 44. 2. ⁸

The *Price* ought to be so just, that the Seller may not suffer ^a above ^r half the true Value by the Sale. This Favour ought also to ^r Ibid. be extended to the Buyer; for if there is a greater Advantage on either Side (whether gained by cunning or not) the Contract may be made void; but in the Valuation of the *Price*, let it be set at the highest, if the highest is just, that the Bargain may subsist, if possible. This Circumvention is tolerated by Consent of Nations contrary to the Law of Nature for the Confirmation of every Man's Title, and for the Prevention of Suits of Law.

A *Price* may be set by the ⁿ Magistrate, as in some well regu- ⁿ C. 1. 4. 1. lated Commonwealths the Prices of Bread, Carriage by Land and Water, &c. are appointed by him. ⁿ It ought to be set according ⁿ D. 35. 2. 63. to

^q Pretium in Numeratâ Pecuniâ consistere debet. I. 3. 24. 2.

Imaginaria Venditio non est Pretio accedente. D. 50. 17. 16.

^r Pretia Rerum non ex affectu & utilitate singulorum, sed communiter funguntur. D. 35. 2. 63. Res tanti valet quanti vendi potest. D. 36. 1. 1. 16.

to the real Worth of the Goods, and not according to the *Affection* or *Conveniency* of a particular Person.

- ^x D. 18. 6. 19. If the Buyer ^x delays the Payment of the Price, the Law hath taken Care to recompense the Damages of that Delay, by *giving* a stated *Interest* for the Money. This Interest seems due in three Cases, *viz.* By expresse *Covenant*; by ^y *Contesting* of *Suit* where there was no *Covenant*;

Of which last there is no Notice taken in the Laws of England.

- ^z C. 4. 49. 5. and from the *Nature* of the *Thing* sold; as when it yielded ^z mean Profits before the principal Money was paid; for then it is so reasonable, that it seems to be a Payment of the mean Profits rather than Interest for a Delay, ^a When Wines are sold and left in the Custody of the Seller for want of Payment, if the Wines sour upon Account of Delay, the Buyer must bear the Damages. ^b If it is agreed, that if the *Price* is not paid at the Time appointed, then it shall be no Bargain, the Seller may make the Bargain void if he thinks fit; for it ought to be in his Power, when the Clause was inserted for his Security. The Seller may ^c detain the Goods till the Price is paid, and the Buyer may refuse the Payment of the Price till ^d Security is given to make a good Title, if that is questioned.
- ^e D. 13. 3. 4. If ^e Time and Place are appointed for the Delivery of Wines, &c. and there is a Failure in the Delivery, such a Price ought to be returned in lieu of them as they would have yielded at that Time and Place.

No Allowance ought to be made for weighing or measuring the Wares, ^f for that is a Condition precedent to the Sale.

- ^g D. 18. 1. 8. 3. ^g The Goods ought to be such as *exist* ^h or may exist *in futuro*, as Corn and Fruits in the Ground,

To sell Corn in the Ground is prohibited in France. Groenw. de LL. Abrog. in Dig. 18. tit. 1. l. 78.

and such as are *certain* and determinate, and that lie in Commerce, and under no Prohibition to be alienated; though a Sale may be without a positive Certainty of any Goods, ⁱ for the next Call of Fish may be bought, &c.

Incorporeal Goods are also positive and certain, as Debts, Services and other Rights.

- ^k D. 18. 1. 34. ^k Things *sacred* or *publick* cannot be sold, nor a Freeman, nor an Estate under *Substitution*,

Which with us is called an Entail.

- ^m D. 23. 5. 3. nor the ^m *Fundus dotalis*, nor Arms, nor ⁿ contraband Goods to Enemies.

This last is lawful in Holland, paying Custom. Groenw. de Legibus Abrog. in Cod. 4. tit. 41. l. 1.

The

^g Mercis Appellatio ad Res Mobiles tantum pertinet. D. 50. 16. 76.

The Sale of another Man's Goods is valid, ° not that the Buyer ° D. 18. 1. 28. shall have Title to them, but that the Buyer may sue for Damages if they are *evicted*; for the Seller must warrant the Title and make amends if the Goods (moveable or immoveable) are claimed by others in ^p whole or in part; and this is of Course, ^q though there is no particular Agreement for it, for the Law endeavours to ^p D. 21. 2. 1. ^q C. 8. 45. 6. promote Justice as far as possible in every Instance.

By the English Laws the Buyer gains a Title without danger of Eviction, if the Sale is in a Fair or Market. D. & Stud. Lib. 1. cap. 25. 2. *Inst.* 713.

If there was an exprefs Agreement that the Seller should ^r not enter into a Warranty for his own Act, it is void because it encourages Fraud. ^r D. 2. 14. 7. 7.

Warranty is either *implied* or *exprefs*. It is ^s *implied* in every Case; but may be *enlarged* by exprefs Covenant; as for the Act of the Prince, &c. or *restrained* by covenanting only for ones own Act and not for the Act of others; or that the Seller shall answer the *Price* only in case of *Eviction*, and not the Interest or Damages; for if the Sale is dissolved by Eviction (*i. e.* by a Recovery of the Title by a Stranger) the Seller shall answer ^t all Damages as well as the Value of the Thing, unless there is a particular Agreement to the contrary. Regard ought to be had to the Value at the ^u *Time* of the Eviction, be it more or less, and not at the Time of the Sale; for the Injury arises at the Time of the Eviction. ^w If one hath built or planted upon an Estate which is evicted, he that possesses ought to pay for the Improvement, or *he* must pay it that made the Sale without Title. Yet the Buyer ought to account for the mean Profits: ^x And if the Improvements exceed the mean Profits, the Buyer shall have the benefit of them. But in all *Evictions* if the Buyer suffers himself to be condemned, by making an ill Defence, and does not ^y acquaint the Seller with it, he shall have no Advantage of the *Warranty*. ^z After the Buyer hath given Notice, and summoned the Seller to *Warranty*, he is not bound to defend the Title; but if the Buyer discovers that the Seller hath deceitfully put upon him a bad Title, ^a he may sue him before the Title is impeached, and recover his Interest and Damages. ^a D. 6. 1. 48. ^b D. 21. 2. 53. ^c D. 21. 2. 63. ^d D. 19. 1. 45. ^e D. 19. 1. 30. ^f D. 22. 2. 70. ^g D. 22. 2. 66. ^h in fin.

By the Common Law of England no Man is bound to warrant the Title of what he sells or conveys, unless there be an exprefs Warranty, or Warranty by Law. 1. *Inst.* 102. a.

Under the Notion of *Goods* all that which belongs to the Thing sold is comprehended; so in the Sale of a ^b House every Thing fixed to it is contained, though not particularly expreffed; also the Locks and Keys which are necessary in the Use of it. In the Sale of Lands the Trees and the Mines pass, but not the Cattel upon it or the Fishes in the Pond. In the Sale of an ^c Horse the Bridle and Saddle is not sold, for they are only for Ornament; but *Custom* oftentimes does determine what shall be comprehended in such a Sale. ^c D. 21. 1. 38.

When the Contract of Buying and Selling is ^d perfected, the Buyer stands to all Loss and Damages, though the Goods (whether

O o o

moveable

moveable or immoveable) are not delivered to him; nor the Price paid, unless the Seller was in Fault, or the Occasion of the Damage by delaying the Delivery, or took upon himself the safe Custody; for the Buyer is to have all the mean Profits that do accrue after the time of the Bargain; as the Rent of Houses and Lands, the young Cattel, &c.

In England no Contract for the sale of any Goods for 10l. or upwards is valid, except the Buyer actually receives part of the Goods, or gives something in Earnest for them, or unless there be made some Note in Writing of such Sale and Contract. 29 Car. 2. cap. 3. *In France the Contract must be in Writing if the Sum exceeds a hundred Pounds.* Loix Civiles, &c. Tom. I. pag. 17. Ord. 1677.

^c C. 11. 55. 1. In many Places ^c Strangers cannot buy Houses or Lands, because the Native Subjects would be impoverished by it.

See pag. 115.

^d C. 4. 63. 3. And generally the ^d Nobility are forbid to trade, either because of the baseness of the Calling; or because the Commons should not be oppressed by their Riches and Power.

This is not observed under any Aristocracy or Democracy in Europe. And in most Monarchies some of the Nobility exercise Merchandize, but not by Retail. Groenw. de Legibus Ambrog. in Cod. 4. tit. 63. l. 3. *Clergymen are also prohibited by the Common Law.* c. 9, 10, 11. dist 8. *and by the Laws of England,* 21 H. 8. cap. 13.

There are several *Pacts* and particular Agreements that usually have attended this Contract of Buying and Selling, as

^e D. 18. 2. 1. ^e *Addictio in Diem*, which is an Agreement betwixt Buyer and Seller, that the Seller may contract with any other Person who will offer a better Price before a fix'd Day.

^h D. 18. 3. 2. ^h *Paetum Commissorium*, when it is agreed that if the Price is not paid before a certain Day, that the Bargain should be void.

ⁱ D. 19. 5. 12. ⁱ *Jus Retractus sive retrovendendi*, which is an Agreement that the Seller or his Heirs shall buy back again the Wares before any other.

The Kindred amongst the Hebrews claimed this Right without particular Covenant, Lev. 25. 23. *And this Custom is approved by the Canons,* cap. restitutus. X. de integrum restitut. *confirmed in the Feudal Law,* 5 Feud. 14, 15, 16. *and followed in most Kingdoms, but not in England.* Groenw. de LL. Abrog. in C. Lib. 4. tit. 11. l. 3.

Some Agreements are forbidden which often follow this Contract; as the Agreement of some few to ^k monopolize Goods, and to sell them at an extraordinary Price, or at a certain Time only.

Sometimes

^a *Periculum Rei venditæ statim pertinet ad Emptorem.* I. 3. 42. 3.

Sometimes for the publick Good a Prince may permit it; as in some Kingdoms a Monopoly of Meal and Salt is erected.

There is a Prohibition also that Merchants and Tradesmen shall not conspire to sell or work at such a Price; that Carpenters and Masons shall not make Agreements to refuse the finishing that Work which was begun by another. The chief Magistrates also are prohibited to buy Lands or Moveables in those places where they govern, unless such Things as are necessary for Food and Raiment. ^{1 C. 1. 53. 1.} This Prohibition extends to their Domesticks for fear of Corruption or Oppression.

This Law is not observed at this Day. Groenw. de LL. Abrog. in Cod. Lib. 1. tit. 53.

A Tutor cannot buy the Interest of his Pupil, neither can a Proctor buy the Interest of his Client's Cause, for these are the Inlets ^{m D. 18. 1. 34. 7. & D. 44. 6. 1. 1.} to Controversies and Extortion.

In France and Holland such Bargains are allowed. Groenw. de LL. Abrog. in Cod 8. tit. 37.

Permutation or Exchange is a Contract without a special Name, ^{n I. 3. 24. 2.} in which one Thing is given for another, as Money for Money, Corn for Wine, &c. and is not perfected by Consent only but by an actual Exchange, for from an Agreement to make an Exchange ^{o D. 18. 1. 1} no Action arises. It is older than Buying and Selling, which is ^{p D. 19. 4. 2. & 3.} Money for Goods, but there is an Affinity in their Natures and Rules concerning Delivery, Warranty, &c. are applicable to one as well as the other. ^{q D. 19. 4. 1. D. 18. 1. 1.} But in Exchange you cannot discern who is the Seller or Buyer, or what is the Price, and which the Merchandize that is bought or sold.

In Letters of Exchange there are three Persons which may be distinguished. He that hath an Occasion to remit his Money, he that receives it and undertakes to remit it, and he that undertakes to deliver it at the Place, viz. the Correspondent of the Banker; and there may be a fourth Person, viz. he to whom the Order is assigned. We call the first the Drawer, the second the Endorser, the third the Acceptor, the fourth the Assignee. I mention this Contract under Permutation or Exchange, because it hath the same Name, but it hath nothing of its Nature; for when one takes up Money to deliver the same Sum at another Place, the Banker and his Correspondent have Partnership or Society; or it is a Commission, and he to whom the Order is given seems to act also by Commission and Authority. Therefore be careful not to confound the one with the other.

See 3 & 4 Ann. c. 9. 6 Ann. ch. 2. Concerning Promissory Notes and Bills of Exchange.

II. Locatio-conductio is one Word (as Emptio-venditio, Bonorum-possessio, &c.) and it is a Contract of the Law of Nations, whereby the

^a I. 3. 25. pr. *the Use of a Thing, or the Service and Labour^a of a Person is gain'd for some time for a certain Reward.*

This Contract is very necessary in the affairs of Mankind, and many Trades are supported by it.

It may be of things moveable or immoveable, as Houses, Lands, &c.

^a D. 19. 2. 22. 1 & 2. ^a D. 19. 2. 19. 1. *Locator* is he that lets out to Hire, *Conductor* he that makes use of the Thing or Service let out to Hire, and gives the Reward for it. Sometimes mere ^a Work only is hired, sometimes the Materials with the Work, ^a which Materials must be good in their kind, otherwise the Damages must be answer'd.

^a D. 19. 2. 1. This Contract is also perfected by bare ^a Consent, as soon as the Agreement is made.

In England all Sales of Houses and Lands, and Leases of the same exceeding three Years, are void without Writing. 29 Car. 2. c. 3. *In Holland Writing is essential to this Contract.* Groenw. de LL. Abr. in C. 4. Tit. 64. l. 24.

^a D. 19. 2. 22. 3. It is like the Contract of Buying and Selling, because it is made by Consent as soon as the Price is settled; and because *Consent*, a *Price* and *Goods* are requisite to the being of it. ^a *Circumvention* also as to the Price is allow'd to half the value, as in Buying and Selling; there being a great Affinity between these two *Contracts*.

^a D. 11. 6. 1. ^a D. 50. 13. 1. 5. ^a D. 50. 13. 4. * But it is unlike the *Contract* of Buying and Selling, because in Selling the *property* is alter'd; whereas in Letting to Hire, the *use* only of the Thing is transfer'd for a time. In *Buying*, a *Thing* to be sold is necessary, but *here* a *Fact* and *Service* of a Man may be *hired*. The Service of an Advocate, Physician, &c. is not properly ^a *hired*; but rather *rewarded* with a Gift or Honorary Present; for it is the Service of the Mind not of the Body. ^a Yet an Action will lie for such Service tho' nothing is promised.

Therefore I cannot but think that there is a little Pride and Vanity in that nice distinction amongst the Lawyers.

^a D. 19. 2. 19. 3. ^a D. 19. 2. 15. 2. In *Buying*, the Price must be in ready Money; but here the Reward may not be in ready Money, but in ^a every thing that consists in number, weight and measure. ^a He that lets out to Hire must stand to inevitable Accidents, but the Buyer (not the Seller) in a Bargain and Sale. It is peculiar to this *Contract*, that he that lets out his Work, Service or Labour, shall answer all Damages occasion'd by his ^b unskilfulness or neglect.

^b D. 19. 2. 9. 5. ^c I. 3. 25. 1. The *Price* or Reward (as in Buying and Selling) may be refer'd to the determination of a ^a third Person; but if at the beginning the Price or Reward is not settled, or at the beginning refer'd to Arbitration, it is not letting to Hire or Hiring, but rather the innominate

^a *Locatio-Conductio est contractus Juris Gentium, consensu constans, de re utenda vel facienda pro certa mercede.* I. 3. 25. pr. --- *Opere Locato-Conducto, ex opere facto Corpus aliquod perfectum significatur.* D. 50. 16. 5. 1.

* *Non solet Locatio Dominium mutare.* D. 19. 2. 2.

nate Contract *facio ut des*. As when I send my Clothes to the Taylor, and *after* the work is done we debate and agree upon the Price or Reward for it.

This Contract may be *tacitly* made, and it is as valid as if the Price was expressly agreed on: For Custom often times will determine the Price; as when a Man goes into a Boat for his passage, by Custom he is presumed to have engaged himself to pay the same Price with the rest of the Passengers; or it may be tacitly made ^d when the first Contract is elapsed, and the Person hiring continues ^d D. 19. 2. in possession, and makes the same use of the Thing or Service by ^{13. 11.} the sufferance of him which let it out to Hire.

One may let to hire Cattel, Houses, Land, Mines, and a ^e Right ^e D. 7. 1. 9. 5. of Hunting, Fishing, ^f Right of Toll, Service, and also Labour, as ^f D. 4. 61. 4. of a Factor or Broker; who are of good use in Ports and great Cities of Commerce to find out Buyers and Sellers, &c.

^g He that hires must not use the Thing hired in any other man- ^g D. 19. 2. ner than was agreed on. He must also answer for those which he ^{30. 2.} employs ^h under him, and even for the mischiefs done by his Enemy, ^h D. 19. 2. if he gave the ⁱ Provocation ⁱ D. 19. 2.

If a Tenant absconds, or ceases to pay his Rent for two Years, ^{25. 4.} the Landlord may ^k break open the Door of his House, and secure ^k D. 19. 2. 56. his Goods for the Rent behind; for what is found upon the Premises, is a ^l Pledge and Security for it; and he is allow'd even to bring ^l D. 20. 2. 2. his Action ^m before the day of payment, if his Tenant does abandon ^m D. 19. 2. the Bargain and abscond. But while he pays his Rent faithfully, the ^{24. 2.} Landlord cannot expel him; ⁿ unless the Landlord himself hath oc- ⁿ C. 4. 65. 3. casion for the House for his own Family. As the Landlord would not have let it, but because he had no use of it, so it is a tacit condition that when he hath occasion, the Tenant should yield it up to him.

This is unknown in England.

But this cannot be applied to a Tenant of Land.

From this one may conclude, that Leases for an absolute or irrevocable term were not then in use. Sed quære.

The ^o Locator cannot always demand the *whole* Price or Reward; ^o D. 19. 2. for sometimes the Judge will remit an equitable part of it; as when ^{15. 2.} the Conductor cannot make use of the Thing hired as was intended, or when he could not receive the profits of the Estate which he farmed by reason of Inundations, or other inevitable Accidents; ^p unless the Year before there was such an advantage which made ^p C. 4. 65. 8. amends for those Losses; for Rent is a payment in lieu of Profits. This may be done therefore without regard to the Rules relating to *Circumvention*.

Though some contend as in England, &c. that the Tenant ought to bear the whole Loss, as he is to receive the whole Crop.

P P P

The

^g Conductor omnia secundum Legem Conductionis facere debet; & si quid in Lege prætermis-
sum fuerit, id ex æquo & bono præstare. I. 3. 25. 5.

The Contract of letting to *Hire* and *Hiring* is at an end when the time agreed upon is ^a expired. Yet sometimes the Contract may be at an end before that time. It ceases on the part of the *Person hiring*, when he finds the Thing hired so faulty that it is in a manner useless; as ^a Houses so ruinous that no one can dwell in them with safety. On the part of the *Person letting to hire*, where he expels his Tenant by the Authority of the Judge before the term is expired. This must be by authority if the Tenant resisteth, ^a for no one ought to judge in his own Cause. If the ^a Landlord would repair his House, the Tenant may remove for a time, with a proportionable abatement of the Rent. This is order'd to maintain the beauty of the Buildings. Or if the Landlord find his House absolutely necessary (as before) ^a for his own Family, which he did not foresee, such a necessity shall be tacitely excepted, and he may remove the Tenant. Or if the Tenant hath failed to pay his Rent for ^a two whole Years, or keeps a ^a disorderly Family in the House, by entertaining lewd Women, Thieves, &c. In all these cases the Tenant may be discharged before the expiration of the Term.

Which is unknown in *England*.

But if there are no such pretences, he may continue the Bargain; and if he dies within the term, the ^a Heir shall enjoy the remaining time.

The Landlord must let the Tenant have his ^a whole Bargain, and Covenant that he shall quietly enjoy.

If the Tenant continues after the term is expired, he is supposed to continue upon the old Agreement.

By the Cannon Law the Tenant (if he is a Student or Scholar) cannot be removed to make room for another, unless by his consent. c. 1. X. de Locat. conduct.

Amongst the English Statutes there are excellent Laws concerning Distresses for Rent. 2. W. & M. chap. 5. 8 Annæ c. 17.

III. *Emphyteusis* (from *improbo* to plant) is a ^a Contract made by consent, but created by the Roman Law and not the Law of Nations; by which Houses or Lands are given to be possessed for ever, upon condition that the Lands shall be improved, and that a small yearly Rent or Pension be paid to the Proprietor. The Pension or Rent may be paid in Money, Grain or any other thing.

The perpetuity of it, or the long term granted, distinguishes it from Hiring and Letting to Hire. For this Contract originally was made of barren Lands, which could find no Tenant, by reason of the Charge of Cultivating and Manuring; and therefore length of time was required to do it, tho' afterwards the best Lands were granted out upon such Conditions. I say it is created by the Civil Law, because it was (after many Disputes) ^a determined to be a distinct

^b *Emphyteusis est contractus Juris Civilis consensu constans, quo Dominus prædii sui Ususfructum plenissimum & quasi Dominium concedit alteri sub lege Meliorationis & præstationis annui Canonis.* I. 3. 24. 3.

distinct Contract from buying and selling, and from letting to hire and hiring, by a special Law. For some thought it to be the Contract of hiring when they consider'd that a Pension or Rent was paid for it to the Proprietor. Others imagin'd it to be the Contract of buying, when they saw the Tenant had a Perpetuity and sort of Property in it. But the Tenant has only *Utile Dominium* not *Directum*; and therefore this Contract is distinct and different from them. The Tenant is call'd *Emphyteuta*, being under an Obligation to plant and improve the Land. ^d He hath such an Interest that he may sell the Profits of his right in the Estate to another, with the consent of the Proprietor; but with this condition, that he must allow two Months to the Proprietor to consider whether he himself will be the Purchaser. ^{d C. 4. 66. 3.}

Laudimium, or the 50th part of the value,

Almost the same with a Relief.

is to be paid to the Proprietor by the new Tenant, as an acknowledgment upon *Investiture*, or for being put into Possession. The Pension or Rent call'd *Canon*, is to be paid annually as an acknowledgment of the superior Title; which cannot be detain'd or remitted, tho' the *Emphyteuta* made no Profits of it that Year, as may be done in letting to hire and hiring; for it is not to be paid by reason of Profits receiv'd as in ^e that Contract, but as an acknowledgment of the tenure. ^{e D. 19. 2. 4.}

This *Emphyteusis* may be either ^f Ecclesiastical or Civil, ^g Perpetual or Temporal. It may be made by Contract, Testament, Prescription and Succession. And it may be lost, and the Tenant removed by the Authority and Sentence of the Judge, if the Tenant ceases to pay the Rent or *Canon* in ^h two Years for an Estate held of the Church or of a Monastery; or for ⁱ three Years upon an Estate held of a secular or private Person. ^{h X. cap. fin. h. i C. 4. 66. 2.}

Though the Canon Law is most severe, yet it allows a rational Excuse for the non-payment, which the Civil Law does not; and in practice the Estate is frequently restored by a full payment of the Arrears. An Emphyteusis seems to have given rise to our Fee-Farms and Copyholds.

The Estate is also lost if the *Emphyteuta* ^k sells or transfers it without the Consent of the Proprietor. ^{k C. 4. 66. 3.}

Otherwise in France and Holland. Groenw. de LL. Abrog. in C. 4. 66. 3.

Also if he commits ^l waste, &c. It ceases likewise by *Unity* of possession, which is call'd ^m Consolidation; and by Renunciation or Surrender. ^{l C. 1. 2. m I. 2. 4. 3. Auth. qui rem.}

This Contract may also be made of ⁿ Houses as well as of Lands, and the *Contractus Superficiarius* hath great affinity with it; ^o in which Contract a Man hires Ground to build upon at a Yearly Rent. ^{n C. 1. 2. o in ruin. D. 43. 18. 1.}

- IV. *Societas* or Partnership had its original either from the smallness of the Stock of particular Persons, who could not trade alone, or from Covetousness, where there was a design of ingrossing, or else from the Nature of the undertaking, which required the assistance of many. ^p It is a *Nominate Contract*, invented by the Law of Nations, *where (by the consent of two or more) Goods or Labour are put in common, that each should share in the Gain and Losses.* The principal concern is Gain or Loss. ^q It must be by mutual consent, ^q for the Partner of my Partner is not Partner with me. It must be of *Publick* or *Private* Things, *Perpetual* or *Temporary*, ^r *General*, of all the Goods a Man possesses, or *Particular* of one Commodity, as Wine or Oil.
- Tho' one brings all his Goods into the Stock, yet that which comes ^s afterwards by Inheritance or Gift is not to be computed as part; for if it came by Inheritance, it is a sort of a *Debt* to himself; if by Gift or Legacy, it may be a *Recompence* or *Reward* to that one Person. Each Man must contribute some share, ^t otherwise it cannot be Partnership. Goods on both sides may be brought into the Society, or on one side Goods, on the other ^u Labour and Service, or Labour and Service on both sides; ^v for between two or more Artificers there may be a Partnership, and their Gains may be in common.
- ^x If nothing is mentioned to the contrary, all are to have equal parts of Loss or Gain proportionably to their Goods brought into the Stock; but by particular Covenant one may have *two* Parts, and the other the *third*. ^y If it is agreed that one shall have all the *Gain*, and that the others shall bear the *Losses*, it cannot be Partnership; for such Covenants are contrary to the Nature of it. That would be such a Division as was made by the *Lyon* in the *Fable*; and to which the Ancients did often allude upon this Occasion. ^z If one is to suffer such a part of the Loss, he is to have his share of the Gain in Course, though not expressed; and if one is to have a share of the Gain, he is by parity of Reason to undergo Losses proportionably. ^a Yet by special Agreement one may have two parts of the Profit, and bear a third part of the Loss; and sustain two parts of the Loss, and have but one of the Profit; or one may bear all the Loss, and divide the Profit; ^b for a Partner may be consider'd extraordinarily (besides his Contribution of Goods) for his Credit, Art or Knowledge, or for his Travel or Dangers which he undergoes in the Management of the common Cause.
- ^c What one Partner suffers for any Injury offered by him, which had no Relation to the Partnership, ought not to be allowed out of the common Stock. And in a Society or Partnership of all manner of Goods, no one shall be allowed out of the common Stock that which he squanders away in Dice or Women; ^d but he must be allowed for the necessary Expences of himself and Family.
- ^e All *Society* or Partnership ought to be to an *honest* Purpose, and if it is founded upon Injustice, the Covenants are null and void.

The

^p *Societas est contractus Juris Gentium consensu constans, quo rei vel operæ communio contrahitur, ad participandum Lucrum vel Damnum.*

^q *Socii mei Socius, non est meus Socius.* D. 50. 17. 47. 1.

^r *Rerum inhonestarum nulla est Societas.* D. 17. 2. 57.

^f The Gains and just Losses therefore being stated, with the necessary Expences, what remains ought to be divided. ^f I. 3. 26. 2. in fin.

The Partnership is *dissolved*,

1. ^g By the mutual *Agreement*, or by *Renunciation* of one of the Partners; which is ordered differently from other Contracts to prevent Discord, which must of Necessity arise when one is forced to continue in Partnership against his Will; and because Partnership of it self does naturally occasion frequent Disputes and Controversies. This Renunciation may be either *express* in direct Words, or *tacit*, as when one begins to trade apart by himself. ^h But this Renunciation cannot be at any Time; for if it is made fraudulently to buy a scarce Commodity alone, &c. or unseasonably, when he foresees Losses just coming, it ought not to be accepted; unless it is to the Prejudice of him that renounces it. So if a Renunciation is made, by one when ⁱ absent, the Profit that is made, till the rest of the Partners have Notice of it, shall be put in common; but if he hath suffered any Loss, he shall bear it himself. ⁱ D. 17. 2. 65.

2. By the ^k *Death* of one of the Partners; for the Industry, Knowledge and Fidelity of that Person might be the Occasion of the first Appointment. By special Agreement it may be continued amongst the Survivors. ^k D. 17. 2. 65.

By the Laws of England Survivorship regularly takes Place only in Jointenancy, unless there is an Agreement to the contrary, or unless the Partnership is amongst Merchants. ^l Inst. 182. a.

The ^l Heir himself cannot be obliged to continue private Partnerships, although there was an express Agreement for it by the Testator or Intestate; for this Contract is made by mutual Consent of every Man that is a Party. Yet the Accounts ought to be settled and perfected by the Heir; ^m for he must share in the Profit and Losses of an Affair which is depending: ⁿ And if the surviving Partners undertake any new Adventure, (not knowing of the Death of their Partner) the Heir shall take part of the Profit and Losses; but if his Death was known, the Society is dissolved. ^m D. 17. 2. 59.

3. By ^o *Accomplishment* of the Business or Affair for which the Partnership was contracted, as for the buying and selling a parcel of Wines, &c. or by Expiration of that Time for which it was agreed to trade in. ^o I. 3. 26. 6.

4. By ^p *Confiscation* of the Goods of one of the Partners; for being under a Condemnation he is dead in Law, and may be reckoned as one *really* dead. ^p I. 3. 26. 7.

5. By ^q *Cession* of all the Estate of one of the Partners to his Creditors, for now he hath no Goods to put in Partnership. ^q I. 3. 26. 8.

6. ^r By *excluding* one that is fallen *mad*, whose Curator also hath Power to renounce for him. ^r C. 4. 37. 7.

Upon the Dissolution of Partnership, ^s *Security* ought to be given on both Sides to bear a part in future Losses, and to divide future Profits. ^s D. 17. 2. 38.

Q q q

In

^f *Lucrum non intelligitur nisi deducto Damno, nec Damnum nisi deducto Lucro.* D. 17. 2. 30.

In the Laws of England there is a Distinction between Copartners, Jointenants, and Tenants in Common. 1 Instit. 163. a. Lib. 3. cap. 2, 3, 4.

¹ D. 17. 1. 1. 4.

V. *Mandatum*, a ¹ Commission or Authority, is a Contract of the Law of Nations, by which an Affair is committed to the Management of another, and by him undertaken to be performed gratis. For though in propriety of expression it signifies only the Fact of the Person authorizing, yet in Law it is taken for a Contract, and the Fact of both Parties. It is founded in Friendship and Humanity; the Rules of it were religiously observed amongst the Romans; for the Mandatary was answerable for the smallest Neglect, and was bound to act with the utmost Diligence. The Person authorizing is the *Mandans*, the Authority *Mandatum*, the Undertaker *Mandatarius*.

It may be *General* and unlimited, or *Special* and restrained; *Judicial* as that of a Proctor in a Court of Justice (which hath no Relation to this Title) or *Extrajudicial* as that of a common Agent, Receiver, Factor, &c. It may be given *expressly* or ² *tacitely*. This Tacit Authority must be collected from Circumstances, as by ³ *Supererogance* or *Confirmation* of what is already done. The Contract may be amongst Persons ⁴ *absent* by Letter, as well as amongst Persons present by verbal Agreement: and it may be ⁵ *absolute* or upon *Condition*. But it must be undertaken *gratis*, or else it will become another sort of Contract, *viz.* that of letting to *hire* and *hiring*.

This Contract had its original from the Necessities of Mankind, when because of Sicknesses, Absence, &c. they could not attend their Affairs personally; and it was contrived to be performed in ⁶ five different Methods, and upon five several Occasions. 1. For the Sake of the Person giving the Authority only, as when one authorizes another to buy him an Estate. 2. For the Sake of the Person undertaking the Management of the Business, pursuant to the Authority; as when I authorize another to lend Money at Interest to a third Person, to make Payment of it to me. 3. For the Sake of a third Person only, as when I give you an Authority to buy an Estate for *Titius*; for though I have no Interest in the Performance of it at first, yet after you have executed that Authority, then I have an Interest, and you and I are subject to each others Action, and I my self am become accountable to *Titius* for such an Undertaking. 4. For the Sake of the Person authorizing, and a third Person; as when I authorize you to buy an Estate for me and *Titius*. 5. For the Sake of your self the Mandatary, and of a third Person, as when I *commission* you to lend your Money out at Interest to *Titius*; for tho' again I had no Interest at the beginning that you should lend your Money to *Titius*, yet since you have acted pursuant to that Order (when it was in your Power not to have acted) I have now an Interest to see that you have acted *bonâ Fide*, and you have an Interest to call me to an Account if I have acted any Thing against you fraudulently, or with any ill Design.

Observe

¹ *Mandatum est Contractus Juris Gentium Consensu Constans, quo Negotium Honestum alteri id suscipienti gratis gerendum committitur.*

Observe that an Order, Commission or Authority differs from *Advices* or ^a *Counsel*. *That* requests and urges the Performance of the Thing, *this* implies that the Advisor is unconcerned and indifferent, whether or no the Thing is performed. *That* again supposes the Person authorizing may have a Design and Interest in the Performance, *This* supposes only the Interest of the Person advised. As for Example, if in general Words one advises and persuades you to put your Money out to Use, this is Counsel and for your *own* Sake, and he can get no Advantage by it; for the Quantity of the Sum, and the Person are left wholly to your own Choice. But if I ^b persuade you to lend *Titius* a certain Sum, this Designation of the Person seems to have the Force of an Authority, and you seem to justify the Security, and to have some Interest in it. Wherefore because he relied wholly upon your Word and Veracity, it is reasonable that you should be liable if the Security fails, and appears to be otherwise than you represented it. This is so far just that if even *general* Advice was fraudulently design'd, the Advisor shall be answerable. ^c For though Advice shall not answer for ill Success, yet it shall be responsible for its Deceit.

Otherwise by the Laws of England.

If an Order or Authority is given for the Performance of some thing that is evil in it self, or ^d against good Manners, though you suffer in Body or Purse for the Performance of it, you can have no Action or Remedy against the Person authorising; but he himself may likewise be punished, sometimes with the same Punishment, sometimes in a lesser Degree. If the Matter of the Authority is just and honest, he that executes that Authority must take care not to transgress the ^e Limits of it, or act *besides* it by doing something else; unless it is most manifestly and without any Possibility of Mis-carriage, and for Advantage, or equivalent to that which was in Commission. For in *private* Commissions we may suppose something is left to the ^f Discretion of the Person authorized in the Execution, who is not tied up to Forms. So if you buy for ^g less Money, and sell for more than you were directed and ordered, the Authority is well executed; but if you buy for more, or sell for less, you have exceeded your Power, and you shall only recover that Money in Buying, which you were authorised to lay out and no more, and you must make up that Sum which you were directed to sell for. If you exceed the Limits of your *Commission*, you your self are bound, ^h but not he that employed you.

These Directions and Observations may hold good in private Affairs; but it is dangerous to take this Liberty in publick Commissions, where the Commands of Superiors are to be strictly executed; for the bare Execution only seems to be left to an Ambassador or Envoy; therefore he must not depart a Tittle from the formal Words, unless

^a *Consilii non fraudulentum nulla Obligatio est. Cæterum si dolus & calliditas intercessit, de dolo Actio competit.* D. 50. 17. 47. *Nemini suum Officium damnosum esse debet.* D. 47. 61. 5.

^e *Diligenter Fines Mandati custodiendi sunt.* D. 17. 1. 5.

unless there is the usual Clause to supply and change, as the Interest of the Person authorizing shall seem to lead (or the like Expressions) to justify him in it.

ⁱ I. 3. 30. 4. This Contract is dissolved. 1. By mutual ⁱ Consent. 2. By the ^k Death of one of the Parties to it, as soon as there is Notice of it; ^l I. 3. 27. 10. for Friendship between them was the Foundation of it. 3. ^l I. 3. 27. 11. By a timely *Revocation* of the Person *authorizing*, and by a timely *Renunciation* of the Mandatary or Person *authorized*. It may be done & 9. by one of the Parties, as in Society or Partnership, ^m I. 3. 30. 4. contrary to the common Rule, because when the Person authorizing seasonably revokes his Authority, his Interest is only concerned; and when the Mandatary renounces in Time, it is reasonable that that also should be allowed; because Acts of Friendship ought not to be extorted.

See the difference between Mandatum and Negotiorum Gestio afterwards in the next Chapter.

In the Laws of England this Contract being to be performed amongst private Persons gratis, and without Consideration, is of no Use. (Dr. & Stud. Lib. 2. cap. 24.) For hiring and letting to hire of Labour and Service is got into the Place of it.

CHAP. VI.

Of Obligations from Improper or Quasi Contracts, created by Law, without Agreement or Consent.

THUS far of the *four* kinds of *nominate* Contracts.

There are some Obligations which arise amongst Mankind without any previous Consent or Agreement; and they are called Improper or *Quasi* Contracts; yet they have as firm a Foundation in Justice as those which are made directly and by Consent. It will therefore conduce to the Peace of Mankind, to let them know from the Rules of Law what Engagements they lie under, though they do not intend it.

To the four Kinds of Contracts which have been explained, (*viz.* Contracts by a *Thing* done, by *Words*, by *Writing*, by *Consent*) the *improper* Contracts may be added.

ⁿ An *Improper* or *Quasi* Contract is as binding to those who are unwilling or ignorant of it, as strongly as those Contracts which are entered into by Agreement. The mutual Obligation springs at first from the Fact of one of the Parties only, and may be described in *eight* Instances, though more may be added to them.

^o I. 3. 28. 1. 1. *Negotiorum Gestio*, which is an improper Contract *wherein one without Authority manages the Affair of another that is absent and ignorant*

^m Quæ consensu contrahuntur, contrariâ Voluntate dissolvuntur. I. 3. 30. 4.

ⁿ Quasi contractus est Negotium, ex quo Jure Civili etiam inter Invitos & Ignorantes Obligatio nascitur, ex Consensu duorum pluriumve præsumpto.

ignorant of it, So that it differs from *Mandatum* and a Judicial *Proctor*, who Act by Order and Authority of a Party; for This Acts by Authority of the Law.

This was introduced for the publick Good, because Men were often forced upon sudden Journies, and had no opportunity of time to appoint Agents to Act for them. Good Nature introduced the Obligation before Religion made it a Duty.

In the management of it the *most* exact diligence is requisite, ¹ I. 3. 28. 1. contrary the common Rule,

[See pag. 107.]

because the Person without any appointment offers his Care, and undertakes the management of his own accord. This diligence being expected will not discourage Men from such Kindnesses, since the hopes of creating Friendships, or Esteem, or the Expectation of a Gratuity will encourage some Persons to it. If they fail, it shall be reckon'd a Fault to meddle with other Mens Matters, ² D. 50. 17. 36. which is order'd for security of those that are absent; if they succeed, there is hopes of Reward which may attend upon it.

* The absent Person must approve of what is well done, and execute all Promises, indemnifie the Agent from all Obligations, and reimburse all Expences. Those Costs which are laid out imprudently and unnecessarily fall upon him that undertook the Business without directions; but if the undertaking was necessary, ³ tho' there was ill success, yet he ought to be recompenced; as when he applied himself to cure a sick Bondman, and the Person died under the Operation. ⁴ So if a Friend of an absent Person buys necessary Provisions for the Maintenance of the Family, and that is destroy'd by Fire or other accident of the like nature, yet he shall recover his Costs. ⁵ What hath been once approved of cannot afterwards be counted as unnecessary, ⁶ and what was once design'd as a Gift, and to be done *gratis* shall not be recover'd afterwards as a Debt. Of which design a Judgment may be made from the nearness of Kin between the Persons, and from other Circumstances.

By the Laws of England, He that without Order meddles with the Affairs of another Person (tho to his advantage) has no Action for his Costs, but is rather a Trespasser.

2. *Tutela Administratio*; for this is not a Contract by Agreement of the Parties, but a Duty imposed on the Guardian by the Publick. The miserable Estate of Orphans seems to challenge this care from the Publick, that another Father should be placed in the room of him that is lost.

Vide antea *Of Guardians*, p. 127.

3. *Communio bonorum*; for that does not necessarily suppose the Contract of *Society* or Partnership, because it may happen to be so

R r r

¹ *Culpa est immiscere se rei ad se non pertinenti.* D. 50. 17. 36.

in *fact* only without Consent or Agreement; as when an Estate descends amongst *Co heirs*.

In the English Laws call'd *Coparceners*.

There each will be bound to the other by the Action *Familia eriscunda*, i. e. to divide the whole Inheritance, and to settle the Accounts which relate to it: Or as when one particular thing is given to two Persons by Legacy or otherwise,

[In the English Laws call'd *Joyntenants*.]

then each will be forced by the Action *Communi dividundo*, to divide share and share like, and to make allowances for extraordinary Costs or Recompence for Damages; or when each of us buy separately from two Persons two different Shares of the same thing, and have different Titles.

With us These are call'd *Tenants in Common*.

^a I. 4. 17. 4. 5. ^a If the Thing cannot conveniently be divided, the whole may be adjudged to one, and the same Person order'd to pay a sum of Money to his Companion for his proportion. But if they cannot agree upon a Division, or upon the Price, it ought to be exposed to ^b Sale. ^c Or if a Division *may be* made, (as of Land, &c.) the greater share may be charged with a *Service* to the other; as with a passage to fetch Water from it and the like. ^d However every Share must stand as a Warranty to the Title of the other Shares of course without special Agreement; and if the Title of any part is *evicted* or recovered, they must come to a new Division, or make recompence for the Loss.

^e D. 10. 2. 5. As to the ^e *Evidences* and Titles belonging to an Estate in *Common*, the Judge may order them to be left with him that hath the best part, and that the others shall have authentick Copies, and a Covenant from him to produce the Original when there is occasion for it. If all have equal Interest, and they cannot agree who shall have the custody of the Writings, the Controversy may be decided by lot, or a Friend may be chosen by the majority of Votes, or nominated by the Judge to have the custody of them.

^f D. 10. 1. 4. 10. 4. *Judicium Finium Regundorum*, will create an Obligation also without the consent of the Parties, where several Proprietors have their Estates so joined and situated, that each Person is forced to keep within his own bounds. ^f Great care ought to be taken of the Boundaries of Lands in open Fields. In Buildings there is either a Wall belonging to one Neighbour only, or common to both, which makes a visible distinction.

^g I. 3. 28. 5. 5. ^g *Aditio Hereditatis*, by which the Heir accepting of the Inheritance is some way obliged to the Legataries by Will, tho' he never made any Contract with them. But as to his Obligation to the Creditors of the Deceased, that is by the *Contract* of the Deceased transferr'd upon him.

^h I. 3. 28. 6. 6. ^h *Solutio Indebiti*, when by mistake one is paid a Debt which was not due to him. Here he is bound to restitution, not from any

any real Contract or Agreement, but by a supposed or implied Contract, and as much as if he had actually borrowed the Money. For it hath great affinity with a *Mutuum*.

Two things are required to create this Obligation. *First*, The Money paid must not be due. *Secondly*, The Money must be paid by mistake, either of the Fact, or of the Law; for ignorance of either is sufficient in this case.

Vide antea, Book I. *Of a Human Act*. pag. 104, 105.

¹ If Money *not* due is knowingly paid, it does amount to a Gift. ^{D. 50. 17. 53.} If it was paid under a doubt it may be recall'd; since Doubt and Error are equally favourable.

This may be extended to all cases where one hath the Goods of another without Title to them; as when the Goods of another are lost and found, he that finds is oblig'd to return them to the true Owner. So that this Obligation may happen where the Goods come to a Man's possession by chance, as well as when they are taken from him by some voluntary Act.

Where a Payment is unlawful, ^k it may be unlawful only on the part of the Person *paying*, or on the part of the *Receiver*, or on the part of the Person paying and the Receiver. ¹ If the fact is unlawful only on the part of him that *pays*, the Receiver shall not regularly be forced to return it; as when one makes a Present to a virtuous Woman with a design to debauch her. If on the part of the *Receiver*, tho' the Gift or Payment is made, it may be recall'd, as when Money is gotten by Threats or Extortion. ^m If the unlawfulness was both on the part of the Person Paying and Receiving, it ought not to be return'd; as when a Woman bargains with a Man, that for a Sum of Money he shall have the use of her Body, or when a Judge is bribed. It matters not whether the Condition is executed or no, for the payment cannot be recovered. ^{D. 12. 5. 1. D. 12. 5. 1. 1. 2. 3. & 14. D. 12. 5. 3.}

The same Law is of Lands erroneously assign'd for the payment of an imaginary Debt; and if any thing of an individual Nature as one piece of Plate, &c. is erroneously paid, or one enclosed piece of Ground, of greater value than the real Debt, convey'd by mistake, the whole may be recalled; because no one is to be forced into Partnership against his Will; tho' the former Obligation (if any thing was due) must remain in force. ^{D. 50. 17. 84.}

7. By *Accidents* Obligations may arise without consent of Parties. Now fortuitous Cases come sometimes by the fact of one Party only, as by Thieves and Robbers; sometimes by the ordinary course of Nature where no Party is concern'd, as from Lightnings, Inundations, Tempests, or from an event partly from the order of Nature, and partly from the fact of Man; as from Fire by negligence. The fact of Man being consider'd more generally, it includes those Events which not only happen'd by the fault or guilt of Man, (which are to be described hereafter) but those events which

¹ Cujus per Errorum Dati repetitio est, ejus consulto dati Donatio est. D. 50. 17. 53.

^m Cum amplius solutum est quam debebatur, cujus pars non invenitur quæ repeti possit, totum esse indebitum intelligitur, manente pristina obligatione. D. 50. 17. 84.

which came to pass *without* his Assistance. *That* only is the Subject of this Place. For * he that finds any Thing lost, is bound as it were by Contract to enquire out the Owner, and to return it to him.

Deut. 22. 1, 2, 3. Exod. 23. 4.

I do not reckon hidden Treasures (which are discovered) amongst the Things which are lost and found.

If Goods are thrown over-board in a Storm to lighten a Ship, he that was the Owner of the Goods must be recompensed by the Master of it, or by a ° general Contribution of those that are left; for he threw out for the general Safety. So if P Provisions fail in a Voyage, if any one hath a private Reserve, he ought to bring it in common. ¶ If a Ship is redeemed from Pirates, all that are concerned in the Cargoe must contribute to the Price of it; but if the Pirates had boarded the Ship, and plundered only some part of the Lading, the Owner of those Goods must bear the Loss, and cannot sue for a Contribution of that which is left. All that is saved from Shipwrack by unloading the Vessel must be estimated according to the Value of it, not according to its Weight or Burthen. † So Jewels, Pearls, Rings, and the Cloaths on each Man's Back must be reckoned according to their Value, and the Proprietors must contribute a fourth, a fifth, &c. in Proportion with the rest of the Crew, who had weightier Goods. For it is the Value, not the Weight that creates the Care and Concern. ‡ If the Main-mast is cut down to save the Ship in Danger, there ought to be a Reparation from the Goods with which she was laden. § But if the Ship is lost, each Man may retain what he can save, and there ought not to be any Contribution for Goods lost, or any Division of those Goods which are preserved in that Manner. ¶ No, not if some Goods were preserved in the Long-boat; for a Contribution is for those Goods which were thrown over-board, and which saved the Ship it self. * If the Goods of one Merchant are cast over to ease the Ship's Burthen, and afterwards the Ship is cast away in another Place, and some of the Goods are recovered by the Divers, those must be divided to make amends for the Goods thrown over-board; for the casting them away conduced to the Recovery of these Goods, because by that Means they were brought to such a Place, where they might be recovered.

8. *Frauds* may also create Obligations where there is no direct Agreement. For if Debtors pass away their Goods or Estates to defraud Creditors, he that receives them shall be forced to return them to the Creditors. * And all Gifts, feigned Bargains and Sales, fraudulent Acquittances, and all Acts tending to that Purpose shall be void. † But what a Father gives in Portion with a Daughter is to be excepted, if the Husband was ignorant of the Fraud; because he received what he ought to receive. ‡ For if a Payment is made to one Creditor of his whole Debt, who knew the low Condition of his Debtor, and there remains nothing to pay others, this is not fraudulent; the rest of the Creditors may blame themselves for not being more vigilant. § But if the Goods of the Debtor are seized by the Creditors, by Virtue of Judicial Process, a Payment to one Creditor is void; or if the Payment is made after a Debtor absconds, it shall be returned and divided equally amongst the rest of the Creditors;

ditors; for the Debtor seems by absconding, to have left his Estate equally amongst them.

These Frauds were very common amongst the Romans, because they contracted often without Writing; and even a Mortgage could be made by verbal Agreement. ^{b I. 3. 16. c D. 20. 1. 4.}

In France all Agreements and Bargains which exceed the value of 100 Livres, ought to be in Writing; and Mortgages are not good unless passed before a Notary, or before a Judge. Loix Civiles, 2 Tom. Tit. 10. Vide Part 12. de la Sect. 1. des Conventions. Which Method makes Forgery almost impracticable. In the conveyance of Lands some such Method is observed in Holland Groenw. de Legibus Abrog. Instit. Tit. 23. So by the Laws of England an Alienation of Land must be in Writing; unless Copyhold or customary Estates; and all Contracts for the Sale of Goods at 10 l. or upwards must be by Note in Writing, except the Buyer receives part of them, or gives something in earnest. 29 Car. 2. cap. 3. Regilters are now erected in several Counties in England to inroll Conveyances and Wills that concern Lands, &c.

Vide the English Statutes concerning

1. Fraudulent Conveyances. 50 Ed. 3. 6. 21 H. 8. 15. 14 Eliz. 8. 13 Eliz. 5. 27 Eliz. 4. 4 & 5 W. & M. 16.

2. Bankrupts. 13 Eliz. 7. 1 Jac. 15. 21 Jac. 19. 4 & 5 Ann. 17. 5 Ann. 22. 5 Georg. ch. . . .

3. Fraudulent Last Wills and Testaments. 3 & 4 W. & M. 13.

CHAP. VII.

Of Crimes, how Divided; and then of Obligations arising from Private and Proper Trespases and Offences, and therein of Theft, Robbery, Damage and Injury.

IN Contracts Men are presumed to enter willingly into an Obligation, and to bind themselves; but by the Commission of Trespases and Offences the Law obliges them whether they will or no.

^a *Delictum*, a Crime is an Act committed against Law, and punishable by it. Though I say an Act committed, yet ^c Omissions are also included. ^f mere Intention is not an Act, neither doth it hurt civil Society. ^{d D. 50. 16. e D. 48. 9. 2. f D. 48. 19. 18.}

A Crime may be committed by Design or Neglect; but when it is by Neglect, the Punishment ought not to be so severe. It may be committed by giving ^h Directions, and by ⁱ commanding another to commit it, if the Event does follow. Also by Assistance ^k before the Fact committed, ^l in the Commission of it, and ^m after the Fact is committed, by receiving and concealing the Criminal. When you act illegally by ⁿ Command of a Superior, as a Judge, &c. you ought

S f f

not

^{g D. 48. 19. 5. h D. 48. 19. 16. i D. 50. 16. j D. 47. 2. 53. k D. 48. 8. pr. & 1. l D. 47. 16. m D. 50. 17. n D. 44. 7. 20.}

^a *Qui Jussu Judicis aliquid facit, non videtur dolo malo facere quia parere necesse habet.* D. 50. 17. 167. 1. — *Ad ea quæ non habent Atrocitatem facinoris ignoscitur servis, si Dominis obtemperaverint.* D. 50. 17. 157.

not to be excused, unless it was doubtful whether the Act was just or unjust, and when the Crime is of an inferior Nature; for where the Magistrate commands Things manifestly unjust or illegal, you ought to disobey. A ^o mere *Approbation* of the Crime after the Commission does not make the Person guilty, but an ^p *Approbation* attended with Fact is equal to a *Command*.

^q D. 48. 8. 12. ^q *Infants*, or those that walk in their *Sleep*, or *Madmen*, cannot be guilty of an Offence, for they can have no Design. But as to *Infants*, Examinations ought to be made of their Understanding and Discretion; for then, if they appear to be near ^r *Puberty*, they may be punished. *Madmen* are so far excused, that if Madness comes upon them ^s after the Commission of the Crime, they ought not to suffer, except perhaps in Treason and Parricide, or some very enormous Crime. This cannot extend to Men *drunk* or in *Passion*; for their Acts are *voluntary*, and they themselves are the Cause of their own Misfortunes. But in ^s some Cases, if the Circumstances of the Fact allow it, a milder Punishment may be inflicted.

^t D. 48. 19. 11. ^t All Crimes are either *Capital* or *not Capital*. ^u *Capital*, whose Punishment is either Corporal by Loss of Life, Liberty, or of the Rights of a Citizen by perpetual Banishment.

Not Capital, where the Punishment is either Corporal or Pecuniary; but it must not be such a corporal Punishment, as inflicts Loss of Life or Liberty by perpetual Imprisonment, or the Loss of the Rights of a Subject by perpetual Banishment.

Crimes are also divided into,

^v D. 47. 1. 3. ^v *Ordinary* and *Extraordinary*. *Ordinary*, which are punished by a certain Law, and a certain Penalty, as Treason, Homicide, Adultery, &c. *Extraordinary*, where the Punishment is *arbitrary* and mutable, according to the Circumstances of the Fact, and Quality of the Person.

^x D. 48. 16. ^x Crimes are also ^x *notorious*, or *occult* and difficult to be proved. Those are *notorious* which are so manifest that the Criminal cannot deny them, as when they are committed before the Judge in Court, or publickly before the People.

They are *publick* or *private*.

^y I. 4. 18. pr. ^y *Publick* Crimes directly tend to the Prejudice of the Commonwealth, and are punishable by the Law, at the Instance of any Accuser. This puts the Party offending under an *Obligation* to the publick Government. Here the Prosecution ends, either in the Death of the Criminal, or corporal Punishment, or by Fine payable to the Exchequer.

Private, which directly hurts a private Person, and is pursued by private Action at the Suit of the Party which suffered by it. For from such an Act an Obligation arises from the Party offending to make him amends. In *private* Crimes there was ordinarily a *civil* Prosecution only, where the Party sued for his own Advantage, either for Restitution of the Thing it self, or for Damages in Money. Though extraordinarily there might be a criminal Prosecution for a private Crime, and the Punishment might be either Corporal or Pecuniary;

^q In Maleficiis Ratihabitio mandato equiparatur. D. 50. 17. 152. 2.

^x Palam est coram Pluribus. D. 50. 16. 33.

cuniary; but the Party guilty is subject to one Process only, and was safe from the other when the Election was determined. Where the Offence is of a publick Nature, it is properly called a *Crime*; when it is private, it may more properly be called *Delictum* or *Maleficcium*, a *Trespass* or an *Offence*.

The Canon Law and almost general Custom makes all Offences to be of a publick Nature; so that in Practice the Distinction of Offences into publick and private is of little Use. Groenw. de LL. Abrog. in Lib. 47. Dig. Tit. 1. But I will follow the strict Notion, and in this and the two next Chapters treat of proper or improper private Offences, which are put as Examples, and not as an exact Division of private Offences or Trespasses; and afterwards I will take occasion to subjoin a Description of publick Crimes.

Private Offences or Trespasses are either *delicta*, or *quasi delicta*, i. e. proper or improper Offences. Of improper Offences in the next Chapter.

The proper private Offences are Theft, Robbery, Damage and Injury.

I. ^a Theft is a fraudulent taking of the Thing it self, or the Use of it, or the Possession, for lucre Sake. I shall particularly examine this Definition.

By taking (*Contrectatio*) it appears that an ^a Intention to steal is ^b not Theft, D. 47. 2. 36.

Otherwise by the Canon Law, c. 12. caus. 23. q. 4.

nor a bare Counsel or Advice. It appears also that a Man may be guilty of this Offence without taking the Thing away with him; for if one comes with an Intent to steal, and being surprized in the Fact, ^b throws away what he designed to carry off, he is guilty. ^b D. 47. 2. 7. Yet it is requisite that the Thing should be ^c removed out of its ^c Place, before the Act can be called a Theft; because otherwise the ^c Possession remains still with the true Proprietor. ^c D. 41. 2. 3.

It must be *fraudulent*, i. e. without the Consent of the Proprietor, and done *privately* to distinguish it from *Rapine*, which is attended always with Violence. It must also be transacted with an ill Design; for the Liberty which Friends usually take amongst one another in the common Use of their Goods without particular Leave and Licence, is not to be accounted Theft. There was no ill Design, and a Consent was presumed. If a Man ^d thinks that he has the Consent of the Proprietor, the honest Intention excuses. So if a ^e Partner takes away the whole Thing in Partnership to himself, ^e because he hath a Right to a Part, he cannot be said to steal the other Part, and to act without the Consent of the Proprietor. ^f When ^f a Man takes away the Goods of a deceased Person before an Heir ^f has declared his Acceptance, &c. and entered upon them, it is no Theft; ^f D. 47. 2. 43. 5 & 68.

^a Furtum est Contrectatio fraudulosa (Lucri faciendi Gratiâ) vel ipsius Rei, vel Usus ejus, Possessionis. I. 4. 1. 1.

Theft; for as yet there is no Proprietor or Possessor to give Consent or deny it.

Of the Thing it self.] This shews that it must be moveable, for incorporeal and ^g immoveable Things cannot be stolen; ^h but to take away the Trees, Gravel, or Fruits from the Ground is Theft.

ⁱ D. 47. 2. 25.
^{pr.}
^h D. 47. 2. 25.
^{2.}

By the Laws of England Corn or Grass standing on the Ground, or Apples, or any other Fruit upon the Trees, or Wood growing cannot be stolen; but if the Owner cut the Corn or Grass, or gather the Fruits, or cut the Wood, then Theft may be committed of them. So it is of a Box with Charters, concerning the Title of Lands; though the Box is of great Value, yet they cannot be stolen, because the Box and Charters concern the Reality. 3 Instit. 109.

ⁱ D. 47. 2. 43.
^{4.}

From another Person.] ¹ For no one can steal what belongs to himself.

^k L. 4. 1. 7.

Or the Use of it.] For if one ^k uses a Thing otherwise than was allowed or granted, he is guilty of Theft.

Or the Possession.] As when the Debtor fraudulently takes away what he pawned to his Creditor, or when a Man deceitfully takes away the Thing lent without the Knowledge of the Person to whom it was lent, &c.

The diverting the use and possession by interpretation was made Theft amongst the Romans, by reason that Theft it self was very mildly punished. In England, and in our Neighbouring Nations there lies only a Civil Action of Damages for the misuse. Groenw. de Legibus Abrogat. in Instit. Lib. 4. Tit. 2. § 1. But if any Person amongst us steals any Goods, which by Agreement he was to use; as in the taking of Lodgings, &c. such stealing is Felony. 3 & 4 W. & M. Cap. 9.

ⁱ D. 47. 2. 53. It is added in the Definition of Theft that it must be for the sake of Lucre. Wherefore if it is a fraudulent meddling, or taking only to injure or damage the Goods, it is a ¹ Trespass and an Offence of another Nature.

In England the taking away of Dogs, Cats, Birds, Monkeys, Foxes, Bears, &c. is not Theft; for they are supposed to be of little or no value, and then the taking is not for Lucre. 3 Instit. 109.

Under this Head enquiry is usually made of one in danger of Starving, who knows no method of relieving his Wants, either by borrowing, by labour, by begging, by complaining to the Magistrate, &c. whether in this case by taking Victuals from his Neighbour he is guilty of Theft. Some hold that it is Theft, and done for Lucre, and that the Penalty only ought to be mitigated or pardoned. Others deny it to be Theft, for that distinct Properties were instituted under a limitation to cease when any one was in danger of Starving, by reason of that institution; for no Man has Power to enter into Contracts to destroy himself. But then he ought to contrive it so as not
to

^g Rei immobilis Furtum non fit. D. 47. 2. 25.

to take from one that is in as bad Condition; and restitution ought to be made when the indigent Person is capable of it.

In England when Men are reduced to extreme Necessity, The Justices of the Peace must order the Overseer of the Poor of the Parish where they dwell, to give them a Weekly allowance, by a Tax upon every inhabitant. 43 Eliz. cap. 2. &c.

Theft is either ^m Manifest or not Manifest.

Manifest Theft is where the Thief is seen in the very commission of the Theft, or taken in the very act, or near the place where it was committed, before he brings it to the place which he design'd on that Day. If he is only seen, an Out-cry must be made, and then he is properly said to be taken in the fact.

Not Manifest, is when the Thief is not taken or seen in the act with an Out-cry, but is discover'd after he has brought the thing stolen to the place design'd. ⁿ He that assisted and directed with his Counsel, is guilty of this sort of Theft, but some times not so severely punished as the Principal; ^o especially if he gave only bare Advice. By a special Law he is guilty of not Manifest Theft, who ^p conceals the Thief or thing stolen. ^q Therefore if any thing is found, it will be prudent in the Person that finds to give publick notice

[As at this day it is customary to do it by the Cryer.]

of the loss and finding; not, that such notice can give a Title, but it may free the Finder from Suspicion that he design'd to conceal it.

^r Neither can the Finder claim any reward, unless there hath been a particular proposal of a reward for the finding of it.

^s The plaintiff in the Action for manifest Theft does recover four times the value of the thing stolen to his own use,

[See Exodus xxii.]

and for Theft not manifest twice the value, besides the recovery of the thing stolen from any Person whatsoever. That the thing stolen should be forfeited to the Exchequer, hath no foundation in reason. Therefore both these several Prosecutions are given to him who suffers by the loss, though he was not the Proprietor of it.

^t Thus a Taylor may recover four-fold for a Garment stolen out of his Shop; for he must make satisfaction over to the true Owner.

^u But suppose the thing was stolen by many Persons, because one Man could not take it away, shall all of them pay four fold? It is adjudged that the Payment of four times the value once is sufficient, tho' all are liable to be punished by a Criminal Prosecution; for no one Person could steal it, nor all could not steal a particular share, because the thing stolen was one and undivided.

It is also to be observ'd that for manifest Theft the Punishment was not always the same amongst the Romans. Sometimes it was pecuniary or whipping, putting out the Eyes, cutting off a Member, and sometimes Death. Alex. ab Alex. 6. gen. dier. The Law of the Twelve Tables gave a liberty to kill Thieves in the Night-time, and

T t t

also

also Thieves in the Day, if they defended themselves with Arms. Gel. Lib. II. c. 18. See Exod. xxii. But the Prætor afterwards made it a forfeiture of four-fold the value only; and for Theft not manifest suffered the punishment of twice the value only, to continue as it was before. Gell. Lib. II. c. 8. or 18. Yet since Trade and Commerce, and consequently Luxury have encreased in the World, these old Laws of Civil Prosecutions have not been thought sufficient to restrain the audaciousness of desperate Men; and therefore Criminal Accusations have been made use of, and the distinction between manifest Theft and not manifest is grown out of use almost in all Countries. Groenw. de Legibus Abrog. in Lib. 47. Dig. Tit. 2. l. 2.

^w Nov. 134.
cap. 13.

^w Justinian appointed Fines or Banishment, or the like Punishments, but not the cutting off any Member; because many Thefts were committed out of Idleness or Want; and he would not incapacitate them afterwards to get their livelihood by working. But the Emperors after him appointed more severe Punishments, viz. for the first time Whipping, the second Stigmatizing on the Back, or cutting off a Member, the third time Hanging; not but that this method was alter'd many times upon occasion, and sometimes Death was the Punishment for the first Crime, if it was above the value of Five Crowns, and the Circumstances of the fact required it. Sometimes also the Punishment might be wholly forgiven, if the Theft was committed out of mere necessity as abovemention'd. If a Criminal does undergo a Corporal Punishment, as Whipping, &c. those that are damnified may notwithstanding have a Civil Action against him for Restitution or Damages. Vide Vinnii Com. hic. in § 5. Tit. de furtis.

Some contend that the Roman Law is very just, and that Death is too severe a Punishment for Theft, because it bears no proportion to the Crime. For what a wide difference is there between the Goods of a Man and his Life? Besides publick Work-houses would be more effectual to suppress the Crime than taking away that Life, which perhaps is a burthen to him that hath it. Upon such considerations the Law of Moses inflicted only a pecuniary Punishment for simple Theft, as Exod. xxii. to which no Man ought to add or diminish.

But it is replied that we are not obliged by the Laws of Moses, which are Judicial or Political; for the punishment of Theft is of that Nature; tho' the Prohibition of it is part of the Moral Law. And that a proportionable Punishment is not absolutely to be consider'd, with respect to the matter of the Crime; but that the main consideration ought to be how the publick Peace and Quiet may be preserved; and that Legislators have power to encrease or lessen the Punishment for that end and purpose.

* C. 3. 15. 1. It matters not in what ^{*}Province the Theft was committed, for the Criminal may be punished in the Province or Country where he was apprehended.

In England a Jury can inquire of nothing regularly but what ariseth within the Body of the County for which they are return'd; therefore if there is an Indictment for a Crime committed in one County,

ty, and it appears upon Evidence to have been committed in another, the Defendant shall be acquitted upon that Indictment. 3. Inst. 135. Hales Pl. of the Crown, tit. Indictments. But v. 3 & 4 W. & M. c. 9. and other Statutes to the contrary.

If a Son takes fraudulently from his Father, it is Theft; but a Criminal Prosecution is not allow'd, because they have some Interest in the Goods, and the Father hath the power of a private Correction.

The Roman Law extends this Impunity to all Domesticks, but that is condemn'd by contrary practice; for a Domestick, except the Son, in France or Holland is more severely punished, because they have greater opportunities of stealing, and are guilty of a breach of Trust. Vinnii Com. § 12. hic in Instit. Groenw. de Legibus Abrog. in Lib. 4. Tit. 1. § 12. See the 21. H. 8. ch. 7. 12 Ann. ch. 7.

The Person committing the Theft sometimes aggravates the Crime, sometimes the Thing stolen; for the stealing of Things consecrated to God, or of the publick Money, or the spiriting away and stealing of Men and Children (call'd *Plagium*) is punished with Death. *Abigei*, the drivers away of ten Sheep at one time, five Hogs, one Horse, or Ox, &c. out of the Fields, Herd or Inns; *Balnearii*, the Stealers of the Clothes of Persons while they are Bathing, and *Saccularii*, Cut-Purses, &c. are more severely punished than ordinarily; because of the difficulties which Men lie under to defend their Goods in such instances, and of the great opportunities which such Thieves have of escaping in a Crowd.

The Time of committing the Theft may also encrease the punishment, as when the Crime is committed in the night by Thieves (call'd *Directorii*) lurking in Houses for that purpose. Here is a great opportunity of committing the Theft, and it bringeth a greater Terror with it by reason of the Darkness.

Exodus xxii. 2.

So the Manner of it ought to be consider'd, as when Thieves enter with Arms and break open Locks and Doors, or dig through Walls, &c.

In France, Spain, and Holland a distinction is made between simple and qualified Theft. Simple Theft is punished with Whipping or Stigmatizing. Qualified Theft (such as is attended with force) is punished with Hanging. In Germany Simple Theft without Force or House-breaking, is punished with Death if the value is above Five Crowns. And so in other Countries Simple Theft is punished with Death if it is of a great value. Matth. de Criminib. Tit. 1. cap. 3. numb. 1, 2, 3, 4.

In Sweden the punishment of Stealing, instead of Death, is a kind of perpetual Slavery, the guilty Party being condemn'd to work

* *Furta Domestica, si viliora sunt, publicè vindicanda non sunt.* D. 48. 19. 11. 1.

work all his Life for the King in making Fortifications or other Drudgery, and always has a Collar of Iron about his Neck, with a Bow coming over his Head, to which a Bell is fasten'd, that rings as he goes along. Account of Sweden. Cap. 3.

In England we distinguish between simple and mix'd Larceny. 1st Simple Larceny is of Two kinds, Grand or Petit. Grand Larceny above the value of Twelve-pence; which if not committed secretly from the Person, nor by putting in fear, the Clergy is allow'd: But if any Person be Convict of such Felony, he may be punished as a Clerk convict by burning in the Hand, without being required to read, and awarded to the House of Correction or Work-house, not less than six Months, nor above two Years. 5 Ann. c. 6. v. post of Stigmatizing. Book 4. c. 4. Petit Larceny, where the value does not exceed Twelve-pence; the punishment is Whipping, or other Corporal punishment, and forfeiture of Goods, but not of Lands. 2^{dly}, Mix'd or complicated Larceny is Robbery, a violent taking from the Person Money or Goods to any value, and putting him in fear. The punishment is Death, and Forfeiture of all his Estate. So if there is a Grand Larceny from the Person (clam & secretè) by picking the Pocket or Purse to the value of Twelve-pence, it is Death without Clergy and Forfeiture, &c. Such as shall rob any Person, or feloniously take away any Goods being in a Dwelling-house, the Owner or other Person being there, and put in fear; or shall rob any Dwelling-house in the Day-time, any Person being therein, or shall be accessory to any of the said Offences; or break any Dwelling-house, Shop or Ware-house thereunto belonging in the day-time, and feloniously take away any Money or Goods to the value of five shillings, tho' no Person be therein; or shall counsel, hire or command any Person to commit any Burglary, being thereof attainted, &c. shall not have the benefit of their Clergy. 3 & 4 W. & M. c. 9. All Persons who by night or day shall in any Shop, Ware-house, Coach-house, or Stable, privately and feloniously steal any Goods of the value of five shillings or more, tho' such Shop, &c. be not broke open, or tho' the Owner or other Person be or be not in such Shop, &c. or shall assist in committing any such Offence, being thereof convicted, or standing mute, or challenging above 20 of the Jury, shall lose the Benefit of Clergy. 10. & 11 W. 3. c. 23. But see 12. Ann. ch. 7.

If any Person shall receive or buy knowingly any stol'n Goods, or knowingly harbour or conceal Felons, he shall be taken as Accessary to the Felony, and being convict shall suffer Death as a Felon. 5 Ann. c. 31.

It is Burglary by the Common Law to break and enter into the Mansion-house of another, or the Out-buildings adjoining, in the night-time, to the intent to commit some Felony in the same, whether the felonious Intent be executed or not. Hales's Pleas of the Crown. Tit. Burglary.

Every Person who shall take any one guilty of Burglary, or the Felonious breaking and entring any House in the day time, and prosecute him unto Conviction, shall receive the Sum of 40l. within one Month after such Conviction. And in case any Person shall be killed by such House-breaker endeavouring to apprehend him, then the Executor or administrator is to receive the said Sum. 5 Ann. c. 31.

A Discharge from all Parish or Ward-Offices granted to those who take Offenders against the 10 & 11 W. 3. c. 23.

2. ^k *Rapina* (Robbery) was a private Offence, and is committed^k I. 4. 2. pr. by taking away a moveable Thing with ill design for Lucre sake; but by force and violence. Those who steal clandestinely shew a fear and reverence for the Law, but these bid defiance to it. It is distinguished from Theft, because it is attended with open Violence; whereas Theft is committed privately.

It is a Species of that which I call'd qualified Theft. v. pag. 255.

If it is of a thing immoveable it is more properly said to be ^l *Invasio*. It must be with ill design, for ^m Force and Violence only^m D. 47. 8. 2. does not denominate it to be Rapine; for there may be a *lawful Force*.

They that are guilty of *Robbery* are either (ⁿ *Effraiores*) House-breakers, or (*Latrones* and *Grassatores*) those that rob upon the Highway; or *Pirates*, those that rob upon the Sea, or (*Expilatores*) those that attack Passengers in the dark and strip them of their Cloaths; and generally all others that take Goods away by force (tho' they do not break open Houses, or take it on the Highway or the Seas) are guilty of *Rapine*.

There must be a *taking away*; it is not sufficient that a Man is put in fear only, and then ^o delivers his Goods of his own accord.^o D. 4. 2. 14. 12.

This distinction is look'd upon to be nice and subtle.

A Man must ^p not take away by force what he believes to be his own (though heretofore this was excusable) lest such pretences should give a colour to Robbers for their plundering; neither ought any one to enter into Lands by force, to which he thinks that he hath a Right and Title; for this liberty would tend to the Disturbance of the publick Quiet, if Men were allowed to be Judges in their own Causes.

A Forfeiture did attend such Proceedings, but it is out of Use. Vinnii Com. in Instit. h. t. § 2.

The ^q punishment of *Robbery* is severer than that of *Theft*, tho' the thing taken is of a small value; for the audaciousness of the fact, not the value of the thing is to be considered. Besides the common prosecution for Theft, Recovery may be within the year of thrice the value with the Goods themselves. After the Year the Goods or the value may be recovered, whether the Criminal was taken in the fact or not. They may also be punished *criminally*, as it is an Offence against the Publick, and prosecuted *criminally, extra ordinem*, according to the circumstances of the fact. ^r The *Effraiores* and *Expilatores* may be condemned to Work-houses. *House-breakers* by night (after they have suffered the Bastinado or Cudgelling)

U u u

were

^k *Rapina est violenta ablatio Rei mobilis lucri faciendi gratia.* I. 4. 2. pr.

^a D. 48. 19. were usually condemned to the Mines. ^a Highway-men, (if they
18. 10. have been often guilty and go armed) may be punished with Death,
^c D. 48. 19. and hung up in Chains where they committed a Murther, or
18. 15. thrown to the wild Beasts. The same punishment also might be in-
flicted on notorious *Pirates*.

^b D. 47. 9. pr. Those that rob, or violently take away any thing while a House
is on " Fire, or upon a Shipwrack, &c. forfeit fourfold within a
year; because the Thieves in these cases are the greater Villains, as
the case of such Persons is so much the more miserable.

*The Prosecution for this Crime of Robbery, which is given to pri-
vate Persons, has been long out of use. For now the Prosecution is
only criminally; and if the Fact is enormous, it is every where punish-
ed with Death; if not enormous, according to the discretion of the
Judge. Groenw. de Legibus Abrog. hic. & in § 8. Inst. de Pub. Jud.
In England, immediately upon Robberies committed in the Day-time,
fresh Suit of Hue and Cry shall be made from Town to Town, and
from County to County. Here if the Countrey cannot bring forth the
Offender, the People of the Hundred where the Robberies were com-
mitted, shall be answerable for the Robberies there done, and for the
Damages, at the Suit of the Party robbed in a private Action. 13
Edw. I. cap. 1, 2. & 27 Eliz. c. 13.*

Vide the Punishment of Robbery before. Of Theft p. 256. as also
the Reward given for apprehending and convicting a Highway-man.
4 & 5 W. & M. c. 8. Those that apprehend other Thieves or Rob-
bers, are rewarded by 10 & 11 W. 3. c. 23. 5 Ann. c. 31.

In Sicily and Naples the Neighbourhood is fined for private Rob-
beries, &c. if they cannot produce the Malefactors, Joan. de Arnono
Different. 13.

^w D. 39. 2. 3. III. *Damage or Injury in general is every " Diminution of a Man's
Goods. Here Theft and Rapine or Robbery are included. ^x But
Damage in this place is to be taken more strictly, for every injurious
Damage to the Goods of another without any advantage to the Per-
son that damnifies them. Hence it is distinguished from Theft and
Rapine, because it is not for Lucre; and thus it is distinguished from
Injury especially so called, which is not considered as a damage to
our Goods, but to the Credit and Reputation. Damage is then to
be taken for all Acts done by Deceit or Neglect (from which the
Damage which we suffer by Law is excluded) for which an Action
was invented for Recompence by the Plebiscite, or Law of *Aqui-
lius* the Tribune.*

Of this *Plebiscite* there are extant two Branches.
^y I. 4. 3. pr. 1. The ^y First Branch gives a Recompence against one that either
wittingly or negligently kills the *Bondman* of another (for a Freeman
cannot be estimated, but his Death is vindicated pursuant to the
Cornelian Law de Sicariis, &c.) or against one that kills another
Mans *Cattel* which are in his Custody, and are feeding in Herds or
Flocks; so that wild Beasts or Dogs are not comprehended under
this part of the Law.

The

^x *Damnum injuriæ datum est læsio rei alienæ contra jus per Dolum aut culpam, etiam levif-
simam data.*

The Damage must be considered here according to what value the Bondman or Cattel destroyed, were worth at any time ² *within* § 9. *the year* before the Wound, though they were blind or lame at the time of the Damage.

This is out of use. Groenw. de Legibus Abrog. Instit. hic.

This Action therefore is penal, because it gives more than the real value, not only with regard to the worth of the thing destroyed, but by Interpretation to all consequential Damage. I do not mean that a regard shall be had to Affection or a *particular* Humour. ^a Thus if one of your Mules or Horses is killed, you may not only be considered for the price of that Mule or Horse, but you ought to recover more, because the *Set* is broken, and the rest like him in Shape and Colour are less to be valued for it. § 10.

I said that *Damage* is to be taken for all Acts done through *Deceit*, and the *smallest* neglect or fault. ^b Now it is not *Deceit* to kill ^b I. 4. 3. 2. in one's own defence; for a Man makes use of his own natural Right when he keeps within the just limits of a Self-defence; which some affirm to consist in a *point*, and to proceed from mere necessity. Therefore if a Bondman should assault my Life upon the Road, or an Ox endeavour to gore me, the killing may be justified if I could not otherwise escape. If the killing is by mere ^c *chance* (as ^c § 4 & 5. when a Soldier kills a *Bondman* or *Cattel* while he is lawfully exercising his Arms in the usual place of Training, unless he shot at them on Purpose; or when one is lopping the Arms of a Tree near the Road or Street, and gives notice of the approaching Danger) there is no neglect or fault if the Party was doing a lawful Act. A Surgeon shall be liable to this Action, which *unskilfully* lets a Bondman Blood, and forsakes the Cure, or a Physician who gives improper Medicines, whereby the Bondman dies; for ^d *unskilfulness* in one ^d § 6 & 7. who professes himself an Artist, is blameable, and it is a ^e fault to ^e D. 50. 17. meddle with such matters which he did not understand. 36.

The reason of this case may extend to any negligence or unskilfulness of Advocates and Proctors.

But care ought to be taken that what the Violence of the Distemper shall occasion, be not imputed to them as their fault. The ^f *weakness* also of one who rides over a Bondman, may be punished ^f I. 4. 3. 8. by this Law, if there were others more strong and skilful that could have managed the Horse; and the Mariner who hath run his Ship a-head upon another's Boat must answer for his Rashness, if it might have been prevented by the Skill of any other Sailor.

Vide of a Human Act, p. 106.

2. ^g The *second* Branch (but originally the third Chapter) of the ^g I. 4. 3. 13. *Plebiscite* of *Aquilus* gives recompence against those, that by deceit or the smallest neglect or fault occasion any other Damage to the *Goods* of others, as by *wounding* another's Bondman or Cattel *without killing*; or against those that do any Damage by burning, breaking, cutting, corrupting, &c. any inanimate thing, moveable or immoveable,

moveable, belonging to another. The Recompence ought to be to the value of the worth of the Bondman, Cattel, or other inanimate thing, which it would yield ^h thirty Days before the Damage was offered.

^h L. 4. 3. 14.

ⁱ § 13.

The killing and wounding of wild Beasts and ⁱ Dogs in the possession of another, may be brought under this Branch.

But again, if the Damage is done either in defence of Life or Goods, there is no deceit or fault in it. In defence of my House

^k D. 9. 2. 49. 1.

^k I may pull down the House of my Neighbour, which is on Fire, to preserve my own. The People assembled are Judges of this Necessity; for there may not be an Opportunity to consult the Magistrates, ^l but he that was the occasion of the Fire shall answer the Damages.

^l D. 9. 2. 30. 3.

[As in the divine Law, *Exod. 22. 6. See the English Statute, 6 Ann. c. 31. concerning the Punishment of Servants firing Houses by their Negligence.*]

^m D. 9. 2. 11.
² & l. 51.

^m If more Persons than one were the Authors of the Damage, all are liable by this Law to pay the whole Recompence; and if one pay the whole that does not discharge his Companion, for the Law is penal and particular.

[*Quære whether this seems reasonable as to the Recompence; it may be allowed as to the Punishment.*]

But the Recompence must be *certain*, not uncertain; for if I cut your Nets, I must not be answerable to pay for all the Fish which possibly might be caught with them.

ⁿ D. 9. 2. 13.

A ⁿ Freeman wounded hath not a *direct* Action from hence, because a Man cannot be called a Proprietor of his own Body, and say that his Patrimony is *directly* diminished by the Wound. Yet by Interpretation and Equity he may be relieved here for the loss of his *Time*, and the *Charge* of his Cure, for by that means his Estate hath been damaged. Regard also ought to be had to the *Deformity* brought upon the Body (especially in the case of a young Virgin) for indirectly ones Preferment in the World in all Probability may be hinder'd or lessen'd by it, and a Man is made contemptible in Conversation upon that Account by Buffoons and petulant Persons. It is just also that the Torment and *Pain* which the Sufferer has undergone, should be regarded, though it cannot be directly included under this Action. If the Person wounded was the Aggressor, and gave the Provocation, the Person wounded may be without

^o D. 9. 2. 23.
^{8.}

Remedy. The ^o Heir of the Person wounded, or of the Person whose Goods have been impaired, may bring this Action; but not against the Heir of him that did the Damage, for that was personal,

^p C. 4. 17. 1.

^p unless the Heir hath been richer by the Damage. And this Action is given not only to the true Proprietor, but to others that have a *special* Possession; except that Person who hath Possession by

^q D. 9. 2. 11. 9.

^q lending.

In England, and in other Countries the Action under this Head of the Aquilian Plebiscite is no more Penal than the other; for the Ag-
gressor

gressor pays only the real value of the Damage and no more. Groenw. de Legibus Abrog. Instit. h. t. But in England there may be a Criminal Prosecution also upon an Indictment, on a Trespass Vi & Armis, and the Court will fine the Offender.

If any of Malice Fore-thought shall cut out or disable the Tongue, put out the Eye, slit the Nose, or cut off the Nose or Lip, or cut off any Limb or Member of another, with intent to maim or disfigure him, it is Death. 22 Car. 2. ch. 1.

IV. * Injury, the fourth and last private Offence, is that which is committed maliciously and willingly to the contumely and grief of another. It affects therefore the Reputation and the Body. There must be Malice in the Act, for a small Fault, as in Damage, is not sufficient to make one liable.

Let us see First, How it may be committed. Secondly, Against whom. Thirdly, What is the Punishment of it. Fourthly, What Circumstances encrease or diminish the Injury. Fifthly and Lastly, How an Injury is abolished.

Men are prone to offer Contumely, and yet are impatient of bearing such an Injury; for no one thinks the Injury small, which has been offered to himself. Upon this Account these Actions are become very frequent, and therefore the Nature of such an Injury ought to be particularly explained.

1. Every Injury is either real, verbal, or written.

A * Real Injury is when by some Fact or Deed an Injury is done to another, either by beating or wounding him, or by often lifting up the Hand to strike, or by vexatiously arresting his Person to appear in a Court of Justice, or by refusing sufficient Bail, or by entering his House by Force, or by mocking him in wearing his usual Habit, or by using a Motion or Gesture to ridicule him, or by following an honest Woman, or attempting her Chastity, &c.

A * Verbal Injury is committed as often as any Reproach or Scandal is thrown upon one, absent or present, with an intent to diminish his Reputation; as by calling one Murderer, Thief, or calling aloud upon a Man to pay his Debts, or by saying any thing that is reproachful or defamatory in the apprehension of wise Men, or by the custom of speaking in that Country, or by reproaching him with the defects of the Body, as that he is blind, lame, crooked, &c. though he is really so; for it is barbarous and inhuman to object that to a Man, which is not in his Power to alter and amend; though in these last Instances the Judge would do well to consider the Circumstances of the Person, the manner of Speaking, whether such a Contumely should be passed by or punished. A * Design to injure will be presumed from the nature of the Words, therefore the Defendant must prove that he had no ill Intention; but if the Words are indifferent or ambiguous, the Plaintiff must prove the Inten-

X x x

tion

* Injuria est Delictum quo quid ad Contumeliam vel Dolorem alterius admittitur. I. 4. 4. pr. & Sect. 1.

* Verberasse dicitur abusive & qui pugnis ceciderit. D. 47. 10. 15. 40.

* Convitium est vociferatio vel prolatio vocis quæ contra bonos mores ad Infamiam vel Invidiam alicujus spectat. D. 47. 10. 15. 4. cum seqq. --- Convitium non tantum Præsenti, sed Absenti fiat. D. 47. 10. 15. 7.

tion of doing an Injury. Words spoken *obliquely* have also a Force, as *I am no Thief*, when he means that you are one. Also Words spoken with a preface of excuse, as *begging your Pardon, you are a Lyar.* ^y It matters not whether he that *reports* the Scandal was the first Author or not, unless sometimes the talkative humour of the Person may be excused if he produces the Author. An ^z Injury likewise may be by Words, though no Reproach or Scandal properly speaking does ensue; as to talk obscenely to a Virgin without making any Attempt on her Chastity; for such Language is an Affront to chaste and modest Persons.

In England by the Common Law defamatory Words are not actionable, otherwise than as they are a Damage to the Estate of the Person injured. The mere Contumely is of little Consideration; and the Ecclesiastical Courts are restrained, if the defamatory Words do not concern a matter merely Spiritual and determinable in the Ecclesiastical Courts, as for calling one Heretick, Adulterer, Dilapidator, &c. 4 Rep. Palmer & Thorp's Case.

A *Written Injury*, or an Injury by *Writing* is greater than that by Words, because it will remain when Words are forgotten.

^a D. 47. 10. 5. ^a It ought to be punished, whether the name of the Author is expressed or not. He is guilty of Injury who either dictates the Libel, or writes, transcribes, publishes or sells it; or if he finds it and shews it to others; for he ought presently to destroy or burn it. ^b D. 47. 10. ^b Though the Libel was not composed directly, and on purpose to abuse a particular Person, yet if one is occasionally scandalized in a Letter, or other Writing in Verse or Prose, he hath an Action. For the Credit and Reputation of Men ought to fall by the Judgment of Magistrates and legal Sentences only, where the Person accused may answer and defend himself, and not by the Satyr of Poets, or the Malice of private Persons; who generally hear but one side of the Question.

^c D. 47. 10. 5. ^c Abusive *Pictures, Statues, Inscriptions, &c.* are reducible to this Head.

^d D. 47. 10. 5. ^d He that discovers the Author, is to be rewarded according to the discretion of the Magistrate.

Thus Injuries may be committed and in this manner: I proceed to shew *against* whom and what Persons.

^e I. 4. 4. 2. & ^e 2. Injuries may be committed *against* the *Person* of a Man, or ^{3.} ^{D. 47. 10. 1.} ^{3.} *against* those who are under his *Government*. So the Father may be injured by an Injury offered to his Son and Daughter, the Husband by an Injury offered to his Wife (but not the Wife by an Injury offered to the Husband, for he does not depend upon the Character of his Wife) the Master by his Servant in an Injury of an high Nature, especially in the case of an Ambassador, when the Injury is offered by one who knew the Servant's Dependence, and therefore commits the Injury with regard to it. So that sometimes it may happen that *three* Persons may have several Actions for one Injury, *viz.* the Daughter, her Husband and her Father.

In England the Husband hath the Action in Conjunction with the Wife.

An

An Injury also to the ^f dead Body of a Man, or to his Bones, or ^f D. 47. 10. 1. to his Monument, is an Injury to his Heir; for in *these* Cases it con- ^{4. & 6.}cerns the Heir to defend the Reputation of the Deceased.

3. The Punishments of Injuries are thus—

For a *real* Injury, viz. for destroying or breaking a Limb, &c. ^{I. 4. 4. 7.} the Punishment formerly was (*Talio*) a Retaliation, or like for like,

[*As in the Mosaical Law, Exod. 21. & 24.*]

unless the Parties would otherwise agree: For breaking the Head, or other Blow, the Offender was fineable; as he is at this Day for breaking a Limb, &c. according to the Nature of the Fact, and Quality of the Persons.

The Lex Talionis is esteemed to be an absurd Law; for it punishes the rich and poor in the same manner, and makes no distinction of Times, or Places or Persons; as if the Injuries offered by a Plebeian to a Senator, and those offered by a Senator to a Plebeian were of the same nature. The Execution also of the Lex Talionis is impossible to be performed, by returning exactly the same Blow or Wound. Oftentimes the Retaliation is apparently too severe, as when a Man with one Eye strikes out the Eye of another, and must lose his whole Sight for it. The Divine Law therefore cannot be understood literally, as an Eye for an Eye, a Tooth for a Tooth, but it must be taken for a proverbial way of speaking, viz. That Punishments ought to be inflicted in proportion to the Crime. So that this Retaliation (as is said) was never executed either in the Mosaical or Roman Law; for the Party offending had the Liberty to agree for Money; and if he would not promise it, the Judge might tax a Sum.

The Punishment of a verbal Injury at this Day in many Nations, is either by (Palinodia) a publick Recantation, Gail. 1. Observ. 65. or by Fine. This Recantation was not practised in old Rome, for it is grounded upon the Canons c. se illic. q. 4. The Romans also would not allow private Persons the Power to lessen or restore any Man's Reputation; therefore the Action was for a pecuniary Recompence by reason of the Contumely.

The Punishment of the Author or Publisher of an *infamous Libel* (if it objected a capital Crime to any one) was ^b Death. But if ^b C. 9. 36. it brought no Man's Life in danger, but the Reputation only, the ⁱ Offender was made incapable to be a Witness, or to make his Te- ⁱ D. 47. 10. 5. 9. flament.

In England the Punishment may be a Fine, the Pillory, or Whipping, and by the general Custom of Europe, the Punishment is arbitrary; but not capital. Vinnii Com. in Instit. Lib. 4. Tit. 4. § 1. Num. 8.

4. The Circumstances which encrease an Injury, may arise, From ^k the Instrument with which it was committed, as when it ^k I. 4. 4. 9. is done with a Sword, a Whip or Club, &c.

From the Person, as when it is offered to a Magistrate, a Clergyman, &c.

From

From the *Place* where the Injury is committed, as in the Market-place, in a Theatre, before a Court of Justice, &c.

From the *Place* where the Blow or Wound was given, as in the Eye, Face, &c.

The Circumstances which *diminish* or *excuse* the Injury, are

1. The *Intention*,¹ as when a Master corrects or chides his Scholars, or a Preacher his Congregation; but if a Preacher makes any personal Reflections, he is not to be *excused*; ^m or when Words are spoken in jest, or when a Striking is in a jocular way.
2. ⁿ *Truth* in reproachful Words will also *excuse* the Offender, if it is for the advantage of the Publick to have the Crime known, as when one is called Thief or Murtherer. Of this there is no doubt, if the Words are spoken before a Magistrate upon Information; ^o but if the Words were uttered with a design to scandalize, or upon a sudden Quarrel, or if it does not concern the Commonwealth to be inform'd of it, as when the Offender has been punished already, or is called a Bastard, &c. or when a natural Defect is objected, as Lameness, Blindness, &c. in these Cases Truth does not *excuse*.

By the Common Laws of England the Plea of Truth has been a sufficient Justification.

3. ^q *Provocation* may excuse, when you retort an Injury in Defence of your self, and not for Revenge, though that does not always deserve Commendation, As when one calls you Thief, and you to save your Reputation presently (not at a great distance of time) reply, That he is a Lyar and a false Man; for this tends to your Vindication. But you must not tell him that he himself is a Thief, for that is not for your Defence. Yet *some* question the lawfulness of replying in the former manner by way of Defence. For though you may repel a *real* force by force, because there may not be time to apply to the Magistrate, yet in the case of a *verbal* Injury there is opportunity and time to complain.
4. ^r A *drunken Fit* may *extenuate* or *excuse* a *verbal* Injury, if the Offender does not get drunk on purpose, and is not sensible of his abusive temper under that disorder. So a ^s *violent* and *just Passion* may excuse or extenuate the Fact, if the Party repents when he is cool, and does not persist in it. ^t But such an Allowance must not be made for every Passion.

Vide of an human Act, p. 105.

5. An Injury is not only diminished or excused, but it is *abolish'd*.
^u *ed.* 1. By the ^v *Death* of the Plaintiff or Defendant. 2. By *Remission*, either by ^w express Agreement, or ^x tacitely by Silence; or by concealing all Resentment, and not taking notice of it at the first.
^y This will appear by the continuance of a voluntary and familiar Conversation. 3. ^y By the *Lapse* of a year.

In England an Action for an Assault or Battery must be brought within

^a *Eum qui nocentem infamat non est bonum & æquum ob eam Rem condemnari. Delicta enim nocentium nota esse & oportet & expedit.* D. 47. 10. 18.

within four Tears after the Cause of Suit; and Actions for Slander, within two Tears after the Words spoken, and not after. 21 Jac. cap. 16.

4. By making ² Satisfaction to the Party injured, either by undergoing the Punishment, or obeying the Sentence of the Judge in some other manner. ^{D. 47. 10. 17. 6.}

In England all private Crimes are call'd Trespasses; and there is no distinction betwixt a Damage and an Injury.

CHAP. VIII.

Of Obligations arising (or created by Law) from Private and Improper Offences and Trespasses.

THE *Private Improper Offences*, or the *quasi Delicta*, are those which are committed without Malice and Design, merely by neglect and imprudence; and are made Offences only by Interpretation. For as there are some Affairs transacted which are not direct and *proper* Contracts, or Contracts by Agreement, (which are therefore call'd *improper* or indirect Contracts) so there are some Offences and Trespasses which are not directly and properly Offences in themselves; yet because they come nearer to the nature of a Trespass or Offence than to that of a Contract, they are call'd *improper* Trespasses and Offences. There are *seven* Instances of them.

1. When a ^{*} Judge thro' ignorance of the Law gives an *erroneous* Sentence; for if there was ^{*} Bribery and Design, it is a *direct* Offence, and punishable by a Condemnation to refund the whole value of the Suit and Costs; besides he is render'd *infamous*, and must pay *treble* of what he receiv'd, or double of what he was only promised, with Banishment and Confiscation of his Estate. But if the Sentence was by *mistake*, then *litem suam facit*, i.e. He himself is made Party to the Action, and liable to the Payment of what shall be adjudged due for Damage. In which it ought to be consider'd, whether the *mistake* was in a common question, or in a point of Difficulty. ^{I. 4. 5. pr. 1. C. 7. 49. Auth. Novo. jure. & l. 2.}

This Law concerning the mistakes of Judges is out of use; the Party having liberty to reverse the Sentence by an Appeal, &c. to a Superior Judge. Groenw. de LL. Abrogat. in Instit. Lib. 4. Tit. 5.

2. When any thing is ^b thrown down, or poured out of a House, ^b without design, into the Streets or Lanes upon Persons that pass by, He that is Master of the Family, Proprietary or Tenant, is under an Obligation to make reparation as if he had committed the Fact himself; tho' afterwards he may have recourse by Action against the real Offender. For he ought to govern his Family more regularly; and it is for the publick Interest that Men should not be disturb'd with Fears of Danger while they are passing upon their law- ^{D. 1. 4. 5. 1. D. 9. 3. 1.}

Y y y ful

^c D. 9. 3. 5. 3. ful occasions. The ^c Master of a School ought to answer for his Scholars.

^d I. 4. 5. 1. 3. If any thing is ^d hung or placed on high, or near a House, that may be *dangerous* to those that pass under, whether any one is hurt or not, the Owner is punishable by Fine.

^e I. 4. 5. 3. 4. When any thing is stolen or damaged in a ^e Ship or Inn, by those that are employ'd in it, the Captain or Master is liable to pay *doubte* Damages to the Passenger or Traveller; for it is easy for the Master to collude with Thieves, or to employ such Servants as might steal for him.

This extraordinary Penalty is out of use.

^f D. 4. 9. 8. If the Damage is done by a ^f Stranger, or if one Passenger or Traveller robs another in the Ship or Inn, the Master shall answer only single Damages for the *negligent* custody of the Goods; because the nature of the Trade is such that he must entertain Persons unknown to him, and where it is impossible to be instructed in their Characters.

^g D. 49. 7. It is sufficient that the Goods were brought into the Ship or House, tho' no particular care was promised, or charge given to keep them safe. ^g But if the Master declares publicly that he will not take care of them, and the Passengers or Guests agree to it, he is not liable. ^h Neither if the Goods are lodg'd with him as a Neighbour or a Friend, is he bound by this *Edict*.

ⁱ D. 39. 1. 1. 5. ⁱ Where a Damage is feared from a Work that is to be erected, there may be *Nuntiatio novi Operis*, or a lawful admonition or prohibition made to him that is erecting the new Work, that he should not proceed till the right was determined, or *Caution* given to answer for the Fact. ^k This prohibition may be either to the Master or the Workmen; and the Prætor may interpose and examine the matter upon complaint.

^l D. 30. 2. 2. 6. ^l *Cautio de damno infecto* may be demanded when a Damage is feared from a Work that is *actually* erected, as from a Building out of repair, or from ^m Trees planted and in decay. Here also upon complaint the Prætor may order security and *Caution*. ⁿ In *Damage*, Sculptures, Pictures, and other Ornaments, ought not to be estimated to the full value; for as they were superfluous, the loss of them cannot be very afflicting.

^o D. 39. 2. 24. 12. ^o If there is danger by digging under a Wall, this security or *Caution* may be demanded.

To this place may be referr'd the Damages which may be done to Estates, by diverting the course of Waters, ^p either by cutting Trenches from Navigable Rivers, ^q or throwing up Dams, whereby the Rain-water may be prejudicial.

^r I 4. 9. pr 7. ^r If a *Beast* through wantonness, fear, or fierceness, *contrary* to the natural custom of its kind, doth any Damage (call'd *Pauperies*) the Owner is oblig'd to pay the Damage if he will keep the Beast; or he may (*Noxæ dedere*) give it alive to the Person injured for the Offence; as when a Dog bites a Man, or an Horse kicks him, &c. then the Owner is discharged.

In

* *Aliquatenus Culpæ reus est, qui operâ malorum Hominum utitur.* D. 44. 7. 5. 6.

In England and in the Empire, the Owner pays the Damage only, and it will avail nothing to deliver up the Beast that did the Damage. Groenw. de Legibus Abrog. in Lib. 4. Instit. Tit. 9.

^s If one Beast stirs up another which commits the Damage, the ^{D. 9. 1. 1. 8.} Master of that only which forced the other must pay the Damage.

^t If one strokes an Horse, and is kick'd by him, the Owner must answer it, but not if the Horse is provoked. ^{D. 9. 1. 1. 7.}

Exod. ii. 29. 36. *And by the Divine Law, he that knowingly keeps an Ox, (that Instance being put for all other Creatures of the like Nature) which has been used to gore, and one is kill'd by him, the Owner shall suffer Death.* Exodus xxi. §. 29. *But where the Owner is in no fault, it is pretended that it is contrary to natural Reason that he should suffer by yielding up the Beast.*

By the Laws of England, if a Beast or any moveable thing inanimate is the cause of the Death of any Man without his fault, it is forfeited to the King as a Deodand. 3 Inst. 57.

If two ^a Rams or Bulls belonging to different Masters, run at each other and fight, one kills the other, if the Aggressor is slain, no Action lies; but if he that gave no Provocation is kill'd, the Aggressor ought to be given up for satisfaction, or the Owner ought to pay for the Loss. ^{D. 9. 1. 1. 11.}

^w What hath been said hitherto, is to be understood of tame Beasts, ^{D. 9. 1. 1.} which contrary to their natures do mischief. But if fierce Creatures, ^{10.} as Tygers, Lyons, &c. do any mischief while they are under custody, the Owners also shall make recompence. But if the Beasts have escaped out of the custody of their Owners, they have recovered their former liberty, and their Owners cannot be call'd to an account for the mischief committed after their escape. ^{D. 9. 2. 3.} ^x If Cattel of their own accord without the direction of their Owner, eat up the Corn ^{1.} of another, the Owner ought to pay the Damage, regard being had to the nearness of the Harvest, and the probability of a plentiful Crop. ^y But if the Master drives the Cattel into the Corn of another Man, ^{C. 11. 6. 2.} the Master shall be punished. ^{& 3.}

^z It is not lawful to detain, or shut up Cattel doing Damage till ^{D. 9. 2. 39.} you have receiv'd Satisfaction; for you are left to your Action. ^{1.}

In England, France, Germany, &c. the Custom is to impound the Cattel doing such sort of Damage, that the Owner may be known, and the Damages secured. Groenw. de LL. Abrog. in Dig. Lib. 9. Tit. 2. l. 39.

C H A P. IX.

In what manner Obligations from Contracts or private Offences and Trespases may be abolished.

AN Obligation is taken away or *Abolished*,
^a I. 4. 30. pr. ^b I. By a ^a true payment of what is due. ^b This is different
^c D. 46. 3. 49. from *Satisfaction*, (^c which is vulgarly call'd Payment) for *that* may
^d I. 3. 30. pr. be made otherwise than by a Payment of what is due. ^d Yet unless
^e D. 46. 3. 99. a Creditor consents, one thing cannot regularly be given in payment
for another. ^e Money of a different Coin is to be esteemed as a
payment for the Money receiv'd, if it is of equal value. But a Cre-
ditor cannot be forced to receive a *part* of his Debt; for the Debt
was contracted for the *whole*, unless he has covenanted to receive it
^f D. 46. 3. 5. 2. by parts. Then if Principal and Interest is due, ^f the first Payment
shall be placed in discharge of the Interest. The Payment may be
^g I. 3. 30. pr. made by a ^g Stranger without the knowledge, or against the will of
the Debtor, and the Creditor shall be forced to receive it. For
if he receives the Debt, he has no Interest to enquire who the Person
is that makes the Payment. If the Bail pays it, he discharges him-
self and the Principal.
^h D. 38. 1. 21. The ^h place of Payment is regularly the House of the Creditor,
ⁱ D. 5. 1. 19. or perhaps the Place where the ⁱ Contract was made; unless another
^j 1. 2. place is particularly agreed on.
The *time* of Payment must be according to the Agreement, and
^k D. 42. 8. 10. before that time the Debt ought not to be demanded; ^k unless
^l 16. there is a suspicion of flight against the Debtor, or that he is be-
come a Bankrupt.
^m D. 45. 1. 38. ^l Altho' the Creditor cannot demand his Debt before the Day ap-
ⁿ 16. & l. 137. 2. pointed, yet the Debtor may pay it to him before the Day, and the
Creditor ought not to refuse it; for the Day seems to be added for
the sake of the Debtor. ^m But if the Money is at Interest, then the
ⁿ D. 45. 1. Day seems to be fixed for the sake of the Creditor, in which case
^o 122. (and upon any other just reason) he may refuse to accept of it.
2. By a feigned or *imaginary* Payment of what is due. This is
^p I. 3. 30. 1. call'd ⁿ *Acceptilation*, which is an acknowledgment of the Creditor,
with a design to discharge the Debtor, that he hath been paid his
Debt, when in truth he has not been paid it.
^q I. 3. 30. 3. 3. By ^o *Novation*, which is a transferring of the first Obligation
into another. This may be two-fold; *either* by transferring the Ob-
ligation in the change of the *Persons*, as when I take *Sempronius*
for my Debtor, for that very Debt which was owed to me by *Ti-*
tius; or it may be by transferring one *Obligation* into another while
the same *Persons* continue. As when that which was due upon
the account of buying and selling from *Sempronius* to *Titius*, is af-
terwards by consent acknowledged to be due as Money lent, &c.
This

^a *Reproba pecunia solventem non liberat.* D. 13. 7. 24. ----- *Solvendo esse nemo intelligitur, nisi qui solidum potest solvere.* D. 50. 16. 114.

^d *Pecuniæ nomine non solum numerata pecunia, sed omnes res tam soli quam mobiles, tam corpora quam jura continentur.* D. 50. 16. 222.

^o *Liberationis verbum eandem vim habet ac solutionis.* D. 50. 16. 17.

This *Novation* is of use to discharge Pledges, Sureties, Interest upon Money lent, &c. and when it is made it must be expressly declared to be done with such an intent.

^p *Delegation* is a *Novation* whereby a Debtor appoints his Debtor to answer a Creditor in his place. ^p D. 46. 2. 11.

4. ^a By agreement of all Parties. For though something in earnest, ^a I. 3. 30. 4. or perhaps security, is given to perform each his part, yet by consent each may recede from the Obligation.

5. By *Compensation* or *Stoppage*, ^a which is a *reckoning* between ^a D. 16. 2. 1. Creditor and Debtor of what is due to each other; or when something therefore ceases to be due, because the Creditor owes to the Debtor a thing of the same kind and value. ^a It must be of the same ^a C. 4. 30. 4. kind and quality, as Money for Money, Oil for Oil, &c. ^a for one ^a & 8. thing instead of another, ought not to be paid without the consent ^a D. 12. 1. 2. 1. of the Creditor. Therefore an Horse cannot be brought in Compensation for the Debt due for an Ox. But there is no necessity that *Compensation* should be in things of the same quantity; for it may be of a Horse for a Horse, of Land for Land; and it arises as well from natural Equity as from positive Law, to prevent multiplicity of Suits, and ^a for expediting Affairs by not paying, rather ^a D. 16. 2. 3. than by paying and suing for it again.

It takes place only in ^a Debts due from Contracts, not in ^a Crimes, ^a D. 16. 2. 1. or in mutual Defamatory Words. Hence in an Action of Injury by ^a D. 48. 5. Words, tho' there is a *Reconvention* between the same Persons, *Compensation* is not to be understood; for each sues for amends for his own Reputation. A *Reconvention* is an Action, but Compensation is not. Compensation ought to be allow'd by the Judge, tho' a Debt due only upon a ^a Natural Obligation opposes a Debt due by ^a D. 16. 2. 6. Law. ^a Yet the Debt on both sides ought to be equally manifest, ^a C. 4. 31. 14. for otherwise the Creditor would be injured, if his Debt which is clearly due should be stopp'd upon pretence of a Debt, which is not so liquid, or apparently prov'd. There are several cases which ought not to come under a Compensation, as some times the Debts of the Publick, an Action for a *Depositum*; for they seem to have a Privilege before Debts of another nature.

In the Common Laws of England Compensation or Stoppage is not allow'd for Payment.

6. By ^a Confusion, when the same Person becomes Debtor and ^a C. 2. 3. 7. Creditor to himself, as when the Creditor is Heir to the Debtor, or the Debtor Heir to the Creditor.

7. By a ^b real Tender and offer of the Debt in Money numbred, ^b C. 8. 43. 9. which if it is refused without cause, it shall be look'd upon as Payment. ^b C. 4. 32. 19. And if any particular *Species* is due and actually tendred, if it is afterwards lost or destroyed, the Debtor is free and released. Yet upon refusal of the Creditor, let the Money be sealed up in a Bag, and deposited with the Magistrate, and then the Interest of the Money will be stopp'd, and the Debtor discharged.

Thus of Obligations arising from *Contracts* and *Trespases*, as they concern the private Interest of Mankind, and in what manner these Obligations may be abolished. It follows that I consider the Obligations from publick Crimes, as they directly disturb the publick Peace.

C H A P. X.

Of Obligations arising from Publick Crimes, viz. Blasphemy, Treason, Adultery, Bigamy, Whoredom, Incest, Sodomy, Homicide, Parricide, Ravishing, Witchcraft, House-burning, Force, Falshood, cheating the Publick, Sacrilege, Bribery, Man-stealing, Ambitus, abusing the Market, &c.

HE that offends the Commonwealth is under an Obligation to yield satisfaction to it, and to every particular Person that will prosecute the Offender. The Peace of the Publick cannot be supported unless Transgressors suffer, that others may be afraid to commit the like. For the end of Penalties is not only to punish Criminals for their Amendment or Extirpation, but to repair the Damages of those that suffered, and to terrify others by the Example.

The Publick Crimes are these,

I. *Blasphemy*, either by *detracting* from God that which belongs to him in Power or Goodness, or by *attributing* that to God which is not agreeable to his Nature.

^c Nov. 77.

The Punishment of it is ^c Death.

As in the Divine Law, Lev. 24. 16. But by the Canon Law it is only a solemn Penance upon Lay-men in the Church, c. ult. X. de Maledicis, and by general Custom either a pecuniary or corporal Punishment, but not Death. Groenw. de Legibus Abrog. in Nov. 77. In the Laws of England, Vide 9 & 10 W. 3. c. 32. where for the first Offence he is incapable of any Office, Ecclesiastical, Civil or Military, &c. who denies one of the Persons in the Trinity, or asserts that there are more Gods than one, or denies the Christian Religion to be true, or the Holy Scriptures to be of Divine Authority.

^d D. 48. 4. 1.
^{1.} & ^{1.} 11. cod.

II. *Treason (Læsa Majestas)* is a ^d Crime committed against the Safety or Dignity of the Supreme Power. The Supreme Authority may be in the Prince, the Nobles, or the People, according to the different Constitutions of Government. It may be committed by Strangers, though they owe their Allegiance to another Prince. But Kings or Embassadors residing within the Territories of other Princes cannot commit Treason; for all supreme Powers are equal, yet they may be treated as Enemies. See p. 144.

^e C. 9. 8. 5.

This Crime was antiently divided into *Perduellionem*, and *Læsam Majestatem* specially so called. ^e That supposed some Act done against the Safety of the Emperor by Rebellion, Murther of his Person, or of the great Men of his Council (for they are part of him)

^f D. 43. 4. 1.
^{1.} & ^{1.} 2. & 3.
cod.

or ^f by corresponding with his Enemies, or when soldiers run from their Colours over to the Enemy, &c. This infers some act done against the Dignity, Honour and Prerogative of the Emperor or

^g C. 9. 24. 2.

Commonwealth, by ^g Coining base Money, whereby the publick Faith is diminished, &c.

But this distinction between Perduellio and Læsa Majestas is now out

out of use, and the Crime is called by the general name of Treason, or Læsa Majestas. Vinnii Com. in Instit. Lib. 4. Tit. 18.

Treason cannot be committed against the ^h Empress, for she her^h D. 1. 3. 31. self is a Subject.

By the Laws of England it is Treason to conspire the Death of the Queen. 25 Edw. 3. cap. 2.

¹ Every one is bound to discover and accuse the Traytor. The Son must impeach the Father, the Wife the Husband, &c. for the welfare of the Publick is to be preferred before private Relation and Affection. C. 9. 8. 5. 6.

^h If the Traytor absconds upon Summons, and is contumacious above a Year, his Estate shall be confiscated. ¹ The Prosecution also may be after the Death of the Traytor, that the Publick may have the forfeiture of his Estate. All Persons, even the most ^m Infamous, are here admitted to be Witnesses; for none but such Persons will be concerned in a Villany of that nature, and the Safety of the Publick must not be tied up to the common Rules observed in private and ordinary Controversies. D. 48. 17. 3. C. 9. 8. 8. D. 48. 4. 4.

The ⁿ Endeavour only to commit this Crime is Treason, if it can be proved by open Act, ^o contrary to the common Rule, viz. That an Endeavour to commit an Offence or Trespass is not punishable. C. 9. 8. 5. D. 2. 2. 1.

^p Railing Words against the Emperor are not Treason, but punishable according to the manner of speaking them. C. 9. 7.

In Scotland if one invites another to his House and kills him, it is Statutory Treason, Mackenzy's Institute of the Laws of Scotland, p. 255.

By the Laws of England Treason is divided into High Treason and Petit Treason; for if a Servant kills his Master, or a Wife her Husband, or a Clergyman his Ordinary, it is Petit Treason. 3 Instit. c. 2. There is also with us a Misprision of Treason. 3 Instit. cap. 3.

^q The Penalty of Treason is the Death of the Traytor, ^r Destruction of his Coat of Arms, Confiscation of all his Estate after his Debts are paid, and a vacating of all Alienations of his Estate since the Commission of the Crime. His Sons (not his Father or his Daughters, or Grandsons) are render'd infamous and incapable of Honours or Succession by Testament, or to an Intestate. C. 9. 8. 5. per tot. D. 48. 19. 24.

In England Daughters as well as Sons and Grandsons are incapable of Honours or Succession.

Sometimes the Sons have been destroyed, because of the Dangers proceeding from a presumed Revenge, and of an hereditary Malice.

Contrary

^o Quid obfuit Conatus cum Injuria nullum habuerit effectum. Cogitationis Pœnam nemo patitur. D. 48. 19. 18. --- Fugitivum non secundum Propositionem solam, sed cum aliquo Actu intelligi constat. D. 50. 16. 225.

Contrary to Deut. 24 & 16.

This Severity was practised, that Fathers might the rather abstain from Conspiracies against the Publick, for the sake of their Posterity, though they have but little Concern for themselves.

The Justice of this Law is questioned, and is not followed in Italy, Spain, France, Germany or Holland, Matth. de Crim. Tit. 2. cap. 3. numb. 11. nor in England.

* C. 9. 8. 5. 5. The * Wives of Traytors undergo no Punishment, and are capable of retaining their Dower.

In England the Wife shall lose her Dower during the Attainder of the Husband. § Edw. 6. 11.

By Custom in France and Holland the Sons are allowed a fourth part of the Father's Estate, or at least a Maintenance, and they are not made infamous or incapable of Honours, or of Succession to other Persons. Perez. Prælectiones in Cod. Tit. 8. Numb. 26. The common Punishment at this Day, is that the Traytor shall be cut alive into Quarters, and those to be exposed in publick Places. In France the Criminal is to be torn by four Horses. Matth. de Crim. cap. 5. Numb. 6. 11.

† D. 48. 5. 6.
l. 34. 1.

III. † Adultery (*Adulterium, quasi ad alterius thorum, or ad alterum ire*) is a carnal Knowledge of another Man's Wife. So that a Wife only can be guilty of Adultery, and a married Man that lies with a single Woman is not guilty of that Crime. His Guilt is only *Stuprum*, because in him there is no Danger of a Confusion in Families, no Bastardy to inherit or rob the Legitimate Children.

By the Divine Law Adultery is every Violation of the conjugal Rites and Marriage-bed, committed either by the Man or the Woman, Lev. 20. 10. And so it is by the Canons. 32. 4. c. nemo. If it is committed by a married Man and a married Woman, it is double Adultery.

‡ C. 9. 9. 34. ‡ Presumptions of guilt may go sometimes for a Proof of this Crime; for when the Man and Woman are seen in Bed together, it is sufficient Evidence; for this Crime will scarce admit of other Proof.

¶ D. 48. 5. 20.
cum seqq.

The ¶ Law permits the Father (not the Mother or Grandmother) to kill the Man taken in Adultery with his Daughter, provided that he kills his Daughter at the same Time; foreseeing that the Tenderness of the Father may be trusted. But the Law denies this Liberty to the * Husband, considering the ungovernable Rage which

* D. 4. 5. 22.

¶ D. 48. 5. 24.

such a Provocation may raise in him. † Yet sometimes the Husband is allowed to kill the Adulterer, when the Crime is committed by a mean infamous Person, and in the Husband's own House.

This Crime being Capital, these Allowances seemed the more reasonable;

able; but now the Punishment being not Capital, these Laws are out of use. Groenw. de Legibus Abrog. in Cod. 9. 9. 4. The Justice of them was always controverted.

If the Husband should kill any other Person taken in Adultery in another Place, or his own Wife at that Time, he ought not to be punished with ^a Death as a Murtherer, for the greatness of the Injury, and the Provocation ought to be considered. ^a D. 48. 5. 38. 8.

In Italy and Spain the Husband is permitted to kill the Adulterer. Gudelin. de Jure noviss. l. 5. c. 18.

^a Justinian allowed the Husband Privilege to kill any Person which he suspected of abusing his Bed, after he had given three Warnings in Writing before Witnesses to him not to converse with his Wife; and then if the Person admonished neglected this Notice, and was found thrice in suspected Places with her, the Husband was excused from the Penalty of Murther if he killed him. And though the suspected Person converses publicly with his Wife, where there is no reason of Jealousy, the Magistrate upon Complaint hath Power to punish him. ^a Nov. 117. c. ult.

The Punishment of Adultery is Death by the ^b Constitution of ^b Constantine. ^b C. 9. 9. 30.

As in the Mosaical Law, Lev. xx. 10. Deut. xxii. 22. and there is great Reason for it, for it may contain in it Theft, by invading the Property of the nearest Concern, and by robbing the lawful Children of their Inheritance, as also Breach of Oath.

^c But it is not made Death in the Wife by the Novels of Justinian. She only undergoes a Scourging and the loss of her Dower; and if afterwards she is confined to a Monastery, the Husband hath Liberty to receive his Wife at any time within two Years; but by that Law it is Death in the Husband. ^c Nov. 117. c. 8. Nov. 134. c. 10.

The Reason of this I cannot understand. It is said that Theodora the Wife of Justinian was the Contriver of it. Some pretend that Allowances ought to be made for the weakness of the Sex.

^d If one lies with another's Wife, not knowing her to be married, as in the publick Stews, this Punishment ought not to be inflicted; for though a Man who attempts an unlawful Thing shall be liable to the Consequences of it, yet those Consequences ought to be of the same nature with the first Design. As when one intends to kill Titius, and kills Mevius by Mistake, he shall die for it; because he intended Murther. But he that intended to commit Fornication with Titia, and ignorantly commits Adultery with her, not knowing her to be married, ought not to be punished for Adultery; for a Crime of a different Nature was intended. What if the Man designed Adultery with Titia, and it appears that Titia is unmarried? Neither ought he in this Case to be punished as an Adulterer, for the Intention and the Act ought to pursue each other, at least in the

A a a a

general

^e C. 9. 11. 1. general Design. ^e If a Woman lies with her Bondman, both suffer Death.

In most Countries at this Day the Punishment of Adultery is a Fine, and sometimes Banishment. Groenw. de Legibus Abrog. in Tit. Instit. de publicis Judiciis. In the Palatinate, Hesse, the Upper Saxony, it is Death. Matth. de Criminib. Tit. 3. cap. 2. num. 2. In Sweden double Adultery only is punished with Death. Account of Sweden. In France Servants that defile the Bed of their Masters, or corrupt their Mistresses or their Daughters, have been punished with Death. Perez. Prælect. in Cod. 9. 11. 1. By the Canon Law, and the Laws of England, the Punishment is only Penance, &c. c. intelleximus, de Adulterio.

^f Nov. 14. ^f He that *prostitutes* his Wife or Daughter for Gain, is also punishable with Death. ^g D. 48. 5. 13. ^g And the same Punishment is inflicted on the Offender who debauches the Woman betrothed to another. ^{8.} C. 9. 9. 7.

As Deut. xxii. § 23. But this is not practised.

^h C. 1. 9. 6. ^h He or she that marries a Jew, suffers the same Punishment as an Adulterer.

By the Divine Law such Marriages are lawful. 1 Cor. vii.

ⁱ D. 48. 5. 13. ⁱ Fornication (*à Fornice*, a Vault where lewd Women used to live) is of a more inferiour Nature, and is committed when an unmarried Man lies with an unmarried Woman, who is a professed Whore; for which the Civil Law hath assigned no Punishment. ^{2.}

The Divine Law hath forbidden it. Lev. xix. 29. and the best regulated Commonwealths will not endure publick Stews, punishing the Crime with Whipping, Penance, or according to the Discretion of the Judge. For the distinction of Families is confounded by it. Quarrels will daily arise amongst Men for the most beautiful Women. Propagation will be hindered if Women were allowed to admit several Men frequently to their Embraces; and the Women would not be able to undergo the Pains and Charge of educating their Children, without the Assistance of the Fathers.

^k C. 5. 5. 2. ^k IV. ^k Bigamy is when a Man marries two Wives, and a Woman two Husbands at the same Time. Several Nations do suffer it in the Male, but not in the Female, because Propagation would be prejudiced by such a Liberty. ^{Auth. hodie.}

^l C. 5. 17. ^l It is punished with Death.

In Friezland it is corrected with the Bastinado, and a temporary Banishment. In Spain, with stigmatizing with the Letter Q which at first was the Figure (2) of two. Matth. de Criminib. Tit. 4. cap. 1. num. 15. In England, the Man or Woman suffers Death as a Felon, but is allowed the benefit of the Clergy. 1 Jac. cap. 11. 3 & 4 W. & M. ch. 9. vide ante. p. 124. Our Lawyers call this Crime Polygamy, and Polygamy Bigamy. 3 Inst. 88.

V. ^m Stu.

V. ^m *Stuprum* is when an unmarried Man lies with an unmarried ^mD. 48. 5. 34. Woman who lives in Reputation, and is not suspected to be a common Prostitute. ^{1.}

The Punishment of Persons of Rank and Figure is a Confiscation of half their Goods; the meaner sort receive corporal Punishment with *Relegation*.

By the Canon Law, he that deludes a Virgin will be forced either to marry her, or give her a Sum of Money. c. 1 & 2. X. h. t. And this was the Divine Law, Exod. xxii. 16, 17. Deut. xxii. & xxiii. & seqq. and it is used in many Countries at this Day. Groenw. in Instit. 4. 18. 4. but not in England. Here is no difference made betwixt Fornicatio and Stuprum.

ⁿ He that deflowers a Girl not fit for Marriage, though with her Consent, may be either banished, or condemned to the Mines. ⁿ D. 48. 19. 38. 3.

In England it is Felony if the Girl is under ten Years of Age. 18 Eliz. cap. 7.

VI. ^o *Incest* is a Crime committed knowingly by that Man and Woman (in the carnal Knowledge of each other) whom the Laws have forbidden to marry, by reason of *nearness* of Blood or *Affinity*. ^o I. 1. 10. I. cum seqq. The Law of Nature forbids it in the ascending and descending Line, the Law of Nations betwixt Brothers and Sisters, and the Civil and positive Laws, where there is any other Prohibition.

The ^p Punishment of it is Death where the Offence is against the Law of Nature. ^p D. 48. 5. 38. 2.

As by the Divine Law, Lev. xviii. 20.

In other cases, *Deportation*. ^a The Portion and Jointure of the Woman are liable to confiscation. ^a C. 5. 5. 4.

But the Punishment of Death, &c. is out of use. Groenw. de Legibus Abrog. in Lib. Cod. 5. 1. 5.

VII. *Sodomy* is when a Man lies with a Man, or with a Woman against Nature, or when Man or Woman lieth with a Beast.

The ^t Punishment of it is the Death of the Man and Woman: ^t C. 9. 9. 31.

[Lev. xx. 9. 13. 15. 16, and by Custom either Hanging or Burning. By the Canon Law Lay-men are to be excommunicated, and Clergy-men are to be deposed and confined to a Monastery.]

But the ^e Endeavour and Attempt to commit this Crime is not punished with Death, tho' in *actu proximo*. ^e D. 47. 11. 1. 2.

VIII. ^t *Homicide* is a violent taking away the Life of Man by another Man unlawfully. By Man both Sexes are understood, and an

^u Infant in the Womb is comprehended under it. ^w Poisoning is the ^u C. 9. 16. 8. more ^w C. 9. 18. 1.

^w Plus est Hominem extinguere Veneno quam occidere Gladio. C. 9. 18. 1.

more odious way of killing, because of the Difficulties to guard against it.

It is *Voluntary, Necessary, or Casual*.

^xD. 48. 8. 1.
1.

I. ^x*Voluntary* Homicide is that which is committed wilfully, either with a Weapon, Fist, Poison, Magical Arts, or by any other means. It is voluntary Homicide to take away a Man's Life by Perjury in a Court of Justice, or if a Magistrate condemns a Criminal to Death by Bribery, or where one contrives that another may be starv'd to Death. It is not material whether the Homicide is committed by your own Hands, or ^y by the Hand of another at your direction; whether upon a Freeman or a Bondman.

^yD. 48. 8. 1.
2, & 15.

Exod. xxi. 20. *The Poles make a distinction, and fine only him that kills a poor ordinary Fellow, and punish with Death him that murders a Person of a better Character and Figure.* Math. de Crimin. Tit. 5. c. 1 num. 7.

^xD. 48. 22.
15.

It is question'd whether it is lawful to kill one under a Ban or Proscription? And it is answer'd, ^z That tho' a Man loses the right of a Subject, yet he retains the rights of Nature, and the benefit, of the Law of Nations, and that therefore it is unlawful.

In Germany there is a Law, that as soon as any one is declar'd to be under a Ban for a Crime proved, his Life and Goods are at the disposal of any Man. Gail de pace pub. lib. 2. c. 5. num. 15. & 16.

Voluntary Homicide may be perpetrated with *Deliberation*, or without *Deliberation*.

Homicide with Deliberation is when one kills another upon a pre-meditated design, and in cold Blood. If the design cannot be proved directly, it may be learnt from circumstances, as when there was Enmity between the Parties, providing Arms, lying in wait, &c.

^xD. 48. 8. 1. 3.
C. 9. 12. 6.

^x A design to wound may be interpreted an intention to kill.

Private Duels were unknown to the Romans, and there was no Laws concerning them. By the Laws of England, if the Person wounded dies within a Year and a Day after his Wounds, it is presum'd that he dy'd of his Wounds. 3. Instit. 53. *In the Milaneie it is Death to give a Wound with Deliberation; so that the Judge may proceed to trial without expecting the event.* J. Clar. pract. crim. 32. num. 10. See 9. Ann. ch. 14. 6. Georg. ch.

^bD. 47. 10.
18. 3.

^b *Sempronius* designing to kill *Titius*, kills *Mævius* by mistake, he is guilty of deliberate Homicide, for he had a design to kill. There was intention and an effect, tho' in the Person of another.

^cD. 9. 2. 11.
3. l. 15. 1. l.
51.

^c One mortally wounds *Titius*, another comes afterwards and kills him out-right, both are guilty. But if the first Wound was not mortal, he that kills him is guilty of the Homicide.

^dD. 48. 8. 15.
1.

^d *Sempronius* commands and encourages *Titius* to beat and wound *Mævius*

^y Nihil interest occidat quis, an causam mortis præbeat. D. 48. 8. 15.---Qui Hominem occiderit punitur, non habet Differentiâ cujus Conditionis Hominem interemit. D. 48. 8. 2.

Mevius, but not to kill him; *Titius* kills him; he that commands is not guilty of Homicide. Otherwise if he had commanded and encouraged to kill him; for it is an assistance.

^e One kills another in a Quarrel; if he struck him with a dangerous^e D. 48. 8. 1. Weapon, it will be interpreted deliberate Homicide.^{3.}

^f The Punishment of deliberate Homicide is Death by the *Cornelian Law*,^f C. 9. 16. 8.

[As in the Divine Law, Exod. xx. 13. Deut. v. 17. Lev. xxiv 17, 21. But by the Canon Law Excommunication.]

and if Thieves are guilty of Murther, they are usually hung upon a Gibbet in the place where the Crime was committed.^g D. 48. 19. 28. 15.

Contrary to Deut. xxi. v. 22, 23.

^h If many attempt the Death of another (tho' it does not appear^h D. 48. 8. 7. who gave the wound) all are guilty of his Death; for their presence made the Murtherer more bold, and the Person slain more fearful in his defence. And so by strictness of Law the design, will andⁱ D. 48. 8. 14. endeavour only to commit Homicide is punished with Death.

But by Custom almost every where the endeavour is punished only by some other corporal Punishment or pecuniary Mule. *Matthæus de Crim. cap. 3. tit. 5. num 11.* But in England if any Person shall attempt to kill, assault, strike or wound any of his Majesty's Privy Counsel in the Execution of his Office, He shall suffer Death without benefit of Clergy. 9 Annæ. ch. 16.

Note, That by the Laws of England, Homicide with Malice forethought or with Deliberation is call'd Murther, which word is necessary in the Indictment. But voluntary Homicide upon a sudden occasion, or without Deliberation, is termed Man-slaughter. The Punishment of Murther is Death without benefit of Clergy. 3. Instit. cap. 7. In Man-slaughter the Criminal is allow'd his Clergy; and if he can read, he saves his Life and is to be burnt in the Hand. 1 Ed. 6. c. 12. 18 Eliz. c. 7. But see 9 Ann. c. 6. If one indicted of Murther or other Felony (except Petit Larceny) stands mute, or will not answer, he shall suffer the pain fort & dure, i. e. shall be pressed to Death by degrees, &c. 2 Instit. West. 1. c. 12. The English call all capital Crimes Felonies. High Treason is Felony and something more. In Scotland all Homicide is capital, except it be Casual or Homicide in Self-defence. Mackenzie's Instit. p. 257.

^k Those that attempt to kill themselves to evade the Punishment^k D. 48. 21. for their Crimes, for which they have been accused, are punished as^{3. 6.} deliberate Murtherers; but those that attempted to destroy them-^{D. 49. 16. 6.} selves out of an impatience of Pain or Grief, &c. were treated with more mildness.^{7.}

For the Gown-men as well as the Soldiers, amongst the Romans, were infected with the vanity of the Stoick Philosophy, which esteemed it an honourable Action. At this day by Custom and Practice, the dead Bodies of those which have been guilty of Suicide, are treated

ted ignominiously, either by hanging on a Gallows, or by burying the Body under it. Matthæus de Crim. Tit. 5. cap. 1. num. 11.

¹D. 48. 8. 1. *Homicide* ¹without Deliberation is committed on a sudden Quarrel and in passion, raised upon great provocation, or in a drunken Fit, occasion'd by some great Emergency, and not from a habit of drinking.

³D. 49. 16. 6. ^mC. 9. 16. 5. ^mIt lies upon the Criminal to prove that he had no fore-thought or design; and if he proves it, the Lives of such Criminals ought to be spared, tho' they may be treated with Severity. For if Death follow'd upon a wound given by an Instrument which was not likely to kill, the nature of the Instrument ought to be consider'd, as also the place of the wound: And if it does appear either that the Instrument was improper and unlikely for the commission of such a Crime, or that the wound by a dangerous Weapon was not likely to be mortal, but that the Person dy'd *ex malo regimine*, &c. in these cases the Criminal is not guilty of *deliberate* Homicide.

⁷D. 48. 8. 17. ^aIf one on a sudden Quarrel is kill'd, and it does not appear who gave the wound, all concern'd in the Quarrel shall be punished, but not with Death.

Vide antea, *The Law of England concerning Man-slaughter*. p. 277.

⁴D. 48. 8. 7. 4. However, he that kills another is to be adjudged ^ounworthy of succeeding him by *Will* or as an *Intestate*; and therefore the Estate ought to go to the Exchequer.

Vid. Nov. 17. *In France and Holland the next Heirs, tho' never so remote, are*
c. 12. Nov. *preferr'd before the Exchequer. For there is no confiscation, except*
134. c. 13. *in the cases of Treason and Blasphemy; there being no reason that the*
Fact of one should prejudice the whole Family. Perez. Prælect. in C. 9. Tit. 16. num. 31.

^pC. 9. 16. 3. 2. ^p*Necessary* Homicide, is when one for the defence of his own
& 5. Life kills the Aggressor. ^aThis may be done without expecting
^aC. 9. 16. 4. the first blow, for that may make him incapable to defend himself at all. But this ought not to exceed the bounds of *Self-defence*. Now those bounds may be observ'd with respect to the *manner*, the *time* and the *cause*.

²I. 4. 3. 2. The ¹*Manner* of Self-defence directs that you should not kill, if you can by any means escape; for you are bound to fly if it may be without danger. Neither is such flight ignominious even in a *Soldier*.

⁶D. 9. 2. 45. 4. The ²*Time* is to be consider'd as when the Person wounded doth not fall upon the Aggressor after the Fray is over, or follow him when he is running away; for that is *Revenge* and not *Defence*. So he ought not to meet him too *soon*.

The *Cause* or Instrument also is to be observ'd; for if you defend your

^a*Vim vi defendere omnes Leges omniaq; Jura permittunt.* D. 9. 2. 45. 4.
Inculpatæ Tutelæ moderatione illatam Vim propulsare liceat. C. 8. 4. 1.

your self against a Stick, by wounding the Aggressor with a Sword, the killing of him will exceed the bounds of Self-defence. * Thus D. 9. 2. 52. 1. if the Aggressor gives you a blow with his Fist or Whip, you ought not to stab him with a Poyniard, because there is no proportion betwixt the Injury and the Revenge.

If the *bounds of Self-defence* are not observ'd, he that kills may be punished, but not with Death, by reason there was a provocation. But if the *manner, time and cause* of Self-defence are rightly follow'd, he that kills the Aggressor is subject to no punishment.

By the Laws of England he shall forfeit all his Goods and Chattels.
3 Instit. c. 8. but he is pardon'd of course. 3 Instit. c. 101. p. 220.

* This necessary Homicide may be extended to the defence of one's *Chastity*; for if an attempt is made upon the Chastity of an honest Woman or Man, they may lawfully kill the Aggressor, even if he attempts the Chastity of any of their Family. * If an honourable Person is treated ignominiously, as when he is stripp'd naked and scourged, he may defend his Honour with the Death of his Enemy. D. 48. 8. 1. D. 4. 2. 8. 2.

In * defence merely of one's *Goods*, killing is not lawful, unless it * be the killing of a Thief by night when your Life is in danger, or when the killing is of a Thief by day that defends himself with a dangerous Weapon. D. 48. 8. 9.

The killing of a Thief by Night, whether your Life was in danger or not, was permitted by the Mosaick Law, Exod. xxii. 2. Quære the lawfulness of it by the Evangelical Law. It was allowed by the Law of the Twelve Tables. By the Laws of England it is permitted to kill one that offers to rob either abroad, or in an House, or one who attempts to Murther. 24 H. 8. cap. 5.

3. *Casual Homicide* is that which happens without the intention of the Person committing it, as when an Hunter kills a Man in the Fields instead of the Game, &c. But for the right understanding of this matter, you must distinguish in *Casual Homicide*, whether it was purely casual, and when you were about a lawful act, & for then it is free from all punishment; or whether there was a fault or neglect, or some *unlawful* act mix'd with it, and then it ought to be punished, but not with Death. C. 9. 16. 1. & 5.

See Exod. xxi. 12, 13, 14. Deut. xix. 1, 2, 3, &c. concerning *Sanctuaries*, in case of casual Homicide. By a Statute in England all *Sanctuaries and their Privileges* are taken away. 21. Jac. 1. By the *Laws of England* the Person committing casual Homicide (call'd *Chance-medley*) forfeits all his Goods and Chattels, but he hath a pardon of course. 3. Instit. cap. 101. pag. 220. By the *Laws of Saxony* a *Weregeld* is paid to the Kindred of the slain; and if he hath no Kindred, the payment is applied to pious Uses; and so by the Custom of other Countries. Matth. de Crimin. Tit. 5. cap. 7. num. 12.

That Homicide which is committed by the Magistrate is lawful, * provided that sort of Death is inflicted which the Law directs. * D. 1. 18. 13.
So

So Homicide committed in War by those who have a just cause of War is by all means to be esteem'd lawful; for in publick Affairs between Nation and Nation, this is the way of punishing Offenders and repairing Damages.

^a D. 48. 9. 1.
^b 3. 1. 4.

IX. ^a *Parricide* properly taken, is Homicide committed by Children upon their Parents, and by Parents upon their Children, and upon those that are in the place of Parents and Children, as Uncles and Aunts, &c. but *improperly* speaking it may be committed amongst Collaterals, *viz.* Husband and Wife, Brothers and Sisters, and those that are allied by Kindred, or Affinity to the fourth degree.

^b D. 48. 9. 9.
C. 9. 17. 1.
I. 4. 18. 6.

The ^b Punishment of *proper* Parricide is that the Criminal should be scourged, and afterwards sewed in a sort of a Sack with a Dog, a Cock, a Viper, and an Ape, and then to be thrown into the Sea, or into a River, as unworthy to have the benefit of any of the Elements. If no Water was near, then the Criminal was thrown in that manner to wild Beasts. Those Creatures were to accompany the Criminal, because they are malicious and mischievous to those of their own kind without any exception.

^c D. 48. 9. 9. 1.
I. 4. 18. 6.

^c *Improper* Parricide is punished only as voluntary and deliberate Homicide.

^d D. 48. 9. 1.
in fin. l. 7.

The ^d *endeavour* and design attended with some external act, is as much punished as if the Wickedness had been accomplished;

[*Not observed in practice.* Groenw. de LL. Abrog. in Instit. lib. 4. Tit. 18. § 5.]

^e D. 48. 9. 6.

and those that ^e assist in the commission of this Crime, altho' Strangers to the Family, are to undergo the like Punishment.

The Punishment for proper Parricide is not in use. There are some remains of it in Spain, but the Criminal is put to Death before he is put into the Sack, or thrown into the Water. Most Countries have their particular Custom of punishing this Crime. Some hang the Criminal, others break upon the Wheel, or tear with hot Pinchers, bury alive, drown, &c. Matth. de Crimin. Tit. 6. cap. 2. num. 17. But in England Parricide and Homicide are not distinguished as to the Punishment.

^f D. 37. 15. 1.
C. 8. 47. 3.
& 4.

^f If Children offer any Violence to their Parents, the *Praefect* of the City may punish them.

To smite or curse the Father and Mother, is Death by the Jewish Law, Exod. xxi. v. 15. & 17.

^g C. 9. 13.
per tot.

X. ^g *Ravishing (Raptus)* is when a Virgin or Widow (more especially Nuns) are taken away by force, with intent to deflour them, or when these are actually defloured by force without taking away. Although the taking away is done with design to marry the Person, the Punishment is not the less, and the Marriage is void. All Accessories and Assistants, Governesses or waiting Women, &c. suffer the same Punishment; neither will the declaration of the Woman, *afterwards,*

^a *Viris bonis & mulieribus metus major stupri quam mortis esse debet.* D. 4. 2. 8. 2.

afterwards, that she consented, excuse the Criminal, if that Consent does not appear from other Circumstances. But if the Woman was under the Government of her Father or Guardian, it is force notwithstanding her Consent.

Observe that the Crime is committed by taking the Woman away without deflouring her, and by a forcible deflouring her without taking her away. Also it ought to be the taking and deflouring of a Woman of an *honest* Reputation; for common Prostitutes are not within the protection of this Law, it being absurd to punish one for an attempt on the Chastity of that Woman, who hath none, or hath no Value for it.

There have been Instances where Women have been punished for taking away young Men by force, with design to debauch them. So that by parity of Reason they are under the same Law.

The Ravisher may be slain by any of the Kindred in the act of taking away, or of debauching the Person ravished.

This is obsolete. Groenw. de Legibus Abrog. in C. 9. Tit. 13.

The *Punishment* is Death and Confiscation of all the moveable Goods of the Ravisher, to be applied to the use of the Person ravished: For force is not to be encouraged or endured in a well regulated Commonwealth, much less *Force* and *Whoredom* join'd together; which wonderfully depraves the Mind, and often occasions Murther.

In several Nations the Penalty of Death is not always inflicted upon the Accessories, nor upon the Principal; especially if the Woman marries the Ravisher. Groenw. de Legibus Abrog. in C. 9. Tit. 13. Amongst the English Statutes; Vide 13 Ed. 1. 3 H. 7. c. 14. where it is requisite that a Maid have Lands or Goods, or be Heir apparent to her Ancestor, to make the taking her away by force to be Felony. Vide 4 & 5 Phil. & Mary, cap. 8. 28 Eliz. c. 6. But a deflouring by Force or a Rape, properly so called, is Death without benefit of the Clergy.

XI. ^h *Witchcraft* (*Maleficium*) is a Crime where one by Charms and evil Arts, and by the Assistance of evil Spirits, doth mischief to Men or their Goods. ⁱ Those that consult Witches are equally Criminal, ^k and both punishable with Death.

^l Constantine the Emperor has declared that *That Magick* which is directed to a good purpose (as to secure Men from evil, to drive away Storms, &c.) is lawful, and ought to be encouraged, but that Law is corrected by the Emperor ^m Leo.

And it is condemned by the Canon Law, X. Tit. de Sortilegiis. The Divine Law having condemned to Death the Witch and him that hath a familiar Spirit; the being of Witches ought not to be questioned by Judges, though the Pretence of a Commerce with the Devil, and the Frauds and Disturbances created in civil Societies upon that Account, may deserve the severest Punishment. Exod. xxii. v. 18. Deut. xviii. v. 10. Amongst the English Statutes, Vide 1 Jac. cap. 12.

ⁿ D. 48. 19.
28. 12.
D. 47. 9. 9.

XII. ^a *House-burners (Incendarii)* are those who (out of Malice or Design to steal) burn Houses in Towns, or Stacks of Corn near Houses, &c. A Man ought not to burn his own House. If it is committed by Neglect, those that suffer by it may sue for Damages. This Crime ought to be punished more severely than Theft, because of the Terror which it strikes into Mankind; and because a Thing stolen still remains for the benefit of the Publick, whereas every thing may be absolutely destroyed by the Fire. This Crime is more pernicious than Murther, for that seldom extends beyond the Design; whereas Fire too often involves in the common Calamity unknown Persons, and Friends as well as Enemies.

The burning of Cottage or House standing by it self, is not punished with Death.

But this distinction of Houses is not allowed by the Moderns. Groenw. de Legibus Abrog. in D. 48. 19. 28. 12.

^o I. 4. 18. 8.

XIII. ^o *Force (Vis)* is that which controlls and imposes a Necessity upon the Will; and is either *Publick* or *Private*.

^p D. 48. 6. 9. *Publick* is Force with Arms, *Private* without Arms. Under the Word ^p *Arms*, not only Swords, Shields, &c. but Clubs, Stones, and every thing which may be instrumental in wounding or beating is comprehended.

^l 11. 1.
^l 4. 18. 5

^q D. 48. 6. 1.
& 2.

^q Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale; for Arms are to be made only for publick Uses.

^r D. 48. 6. 3.
^l 3. 1. 5. &c.

^r Those who raise Multitudes in Arms for Sedition, or to burn Houses, to take possession of an House or Land, to eject lawful Possessors, to raise Contributions, or break the publick Peace, &c. are to be ^s punished by Deportation or Banishment, and sometimes the Criminals have been punished with Death.

^s D. 48. 7. 6.
& 10.

^t D. 48. 7. 2.
cum seqq.

^u D. 48. 7. 1.

^t Those are guilty of *Private* force, who call a Multitude together to do some illegal Act by force on a private Account. ^u This was punished by a Confiscation of the third part of the Estate of the Criminal.

But at this Day the Punishment of publick and private force is arbitrary, and at discretion. Groenw. de Legibus Abrog. in Dig. 48. Tit. 6 & 7.

^w I. 4. 18. 7.

XIV. ^w *Falshood (Crimen falsi)* is a fraudulent *Suppression* or *Imitation* of Truth to the Prejudice of another. So that three Things are requisite to the Commission of this Crime, *Corruption of Truth*, *Deceit* and *Damage* to another. Though Truth is but one and consists in a Point, yet *Falshood* has various Shapes, and may be committed in many Instances, *viz.*

By

^a *Vis est majoris Rei impetus qui repelli non potest.* D. 4. 2. 2. *Vi factum id videtur esse, qua de Re quis, cum prohibetur, fecit.* *Clam, cum quisque, cum Controversiam haberet, habiturumve se putaret, fecit.* D. 50. 17. 73. 2.

^p *Armorum appellatio non utique Scuta & Gladios & Galeas significat, sed & Fustes & Lapides.* D. 50. 16. 41. *Telum est quod ab arcu mittitur, sed & Lapis, &c. hoc nomine continentur.* D. 50. 16. 233. 2.

By bare ^{*} *Consent*, when one sells or mortgages the same Thing ^{*} D. 48. 10. 21. to two Persons in two several Contracts.

By ^y *Words*, as by Perjury, when a Witness knowingly bears false Witness in a Court of Justice, or is guilty of suborning others. ^y D. 48. 10. pr. & 1.

By ^z *Writing*, as in Forgery, or signing of false Instruments and Deeds, or knowingly using Instruments forged by others; or when a Notary writes that which was false, or omits that which is true, or by concealing any Writing, or blotting, cutting out what was written, or ^a opening unsealing and altering the Wills or private Letters of other Men. ^z D. 48. 10. 2. ^a D. 48. 10. 1. 5.

By *Fact*, which has no Relation to Writing, as when a ^b Child is fraudulently put in the place of another Child; when a false Person is represented: ^b D. 48. 10. 16. 2. ^b D. 48. 10. 30. pr. & 1. l. 8.

[In England this is Felony in some Cases, 21 Jac. 1. 26. See 4 & 5 W. & M. ch. 4. 9 & 10 W. 3. ch. 41.]

false Weights and Measures made use of; a false Coat of ^c Arms assumed; the publick Money clipped, or false Money coined, &c. ^c D. 48. 10. 27. 2.

The ^d *Punishment* of this Crime is sometimes Deportation, sometimes Death or a less Punishment. Where there is no proper Punishment assigned, it is the Crime of *Stellionate*, and may be punished arbitrarily, and at the discretion of the Court. ^d I. 4. 18. 7.

Vide post p. 287.

In France it is *Death*. In Holland the *Bastinado* or *Banishment*. Groenw. de Legibus Abrog. in Instit. 4. 18. 7. In England *Forgery* may be punished by *Fine and Pillory*, both *Ears to be cut off*, the *Nostrils to be slit*, *Forfeiture of Estate during Life*, and *perpetual Imprisonment*. The second Offence of this Nature is punished with *Death as a Felon*, without the benefit of the Clergy, 5 Eliz. cap. 14. But to imbezle a Record is *Felony*. 8 H. 6. 12. vide post Book 4. chap. 2. Of Instruments. Perjury is punished by *Fine of twenty Pounds*, *six Months Imprisonment*, and ever after disabled to give Evidence, &c. 5 Eliz. ch. 9.

By the Divine Law it shall be done to a false Witness, as he thought to do unto his Brother. Deut xix. 19.

XV. ^e *Crimen Peculatus* (*à pecore* Cattel, in which Riches did consist before Money was invented) is a stealing of the publick Money, or publick Stores, or a cheating in publick Accounts. By publick Money I do not mean the Money of any ^f City or Corporation, for stealing of that is but common Theft, but the publick Money belonging to the Commonwealth is to be understood. ^e D. 48. 13. 1. & 10. ^f D. 50. 16. 15.

The ^g *Punishment* is Death, both in the Principal and the Accessories, if committed by Magistrates; otherwise Deportation. This sort of Theft ought to be treated with Severity, because it is easily committed, and is attended with breach of Trust. ^g I. 4. 18. 9. ^h C. 9. 28.

XVI. ^h *Crimen Residui* is almost of the same Nature, but it is particularly described to be an applying of the publick Money to other purposes than directed, or else not applying it to any publick use at all. ^h D. 48. 13. 2. & 1. 4. 3.

The *Punishment* is a certain pecuniary Mulct.

XVII.

XVII. *Sacrilege* is the stealing of a thing dedicated to God in a consecrated Place. ¹ For if any thing belonging to private Persons left in a Church is stolen, it is only Theft, not Sacrilege.

But the Canon Law determines that also to be Sacrilege. Caus. quisquis 17. qu. 4. as it does the stealing of a Thing, known to be consecrated, in a Place not consecrated.

^k C. 9. 29. 2. ^k Those also are guilty of Sacrilege, who without Authority take away Persons that have fled to Churches for *Sanctuary*.

But this Law is obsolete. Groenw de Legibus Abrog. in C. 1. 12.

¹ D. 48. 13. 6. The ¹ *Punishment* for the most part is Death; but regard ought to be had to the *Thing* stolen, the *Time*, the *Place*, the *Age*, the *Sex* of the Offender.

By the Laws of England Sacrilege is Felony without Clergy. 1 Ed. 6. c. 12. 11 Rep. 29. But in Practice is not more severely punished than other Thefts. And so it is in some other Countries. Groenw. de LL. Abrog, in lib. 4. Inst. tit. 18. § 9.

^m D. 48. 11. 1. cum seqq. XVIII. ^m *Bribery* (*Crimen Repetundarum, à pecuniis repetendis*) is the receiving of Money, or Presents by Persons in publick Office, either to do Justice, or to commit Injustice. If it should be permitted to receive Money on any terms, the pretence would be at all times, that the taking was to do Justice, and then it would be impossible to make any discovery. Besides Justice ought not to be sold; but Salaries should be allowed by the Publick. ⁿ Such Officers also ought to suffer, if their Wives or Servants receive Presents; for it is fit that they should answer for the Fidelity of their Family. ^o C. 9. 27. 6. ^o Neither ought the Master to receive any thing after he hath laid down his Office for Kindnesses done in his Office; for Magistrates ought to be as free from Covetousness as from Fear. ^p Presents of Meat and Drink, that are presently to be spent, were allowed, especially from the Kindred of the Magistrate; for there is little ground for Suspicion. Also the Magistrate might receive Presents from other Persons to the value of 500 *aurei* in any one Year, ^q if they had not any Suit or Petition depending before him; for it would be unjust to suppose that the favour of the Prince should put a Magistrate in a worse Condition than he was before in his private Station.

^r C. 1. 53. 1. ^r Magistrates ought not to buy any thing of Persons under their Jurisdiction, or in their Province, nor hire or let out to hire, &c. ^{1, 2, 3, 4} For Bribery may be covered under such Contracts.

This is obsolete; the buying of Titles depending before the Magistrate being only prohibited. Groenw. de Legibus Abrog. in C. 1. 55.

^s D. 48. 11. 7. 3. The ^s *Punishment* of Bribery is Death, if the Bribe was received to put an innocent Man to Death; and it is Banishment to absolve the Guilty upon such Accounts. ^t Bribery in civil Causes was punished with Banishment and Confiscation of the Estate, or ^u sometimes by a Confiscation to restore fourfold for the Damage. And this

this also extends to the ^v Heir after the Death of him that was ^v D. 48. 13. guilty, if the Action is brought within a Year after his Death; for ¹⁴ the Heir is enriched by the Crime.

The ^x Person that gives the Bribe is also punishable.

^x C. 9. 27. 6.

But by the present Custom Bribery is punished arbitrarily, or at the discretion of the Court, by Fine, or by a Removal from the Office. Groenw. de Legibus Abrog. in Instit. 4. Tit 5. num. 2.

XIX. ^v *Man-stealing* (*Plagium* from *πλάγιον* crooked) is a fraudulent taking away, or concealment of a Freeman, or of another Man's Slave. This may be committed by selling, giving, exchange, &c. It is not properly *Theft*; for a Freeman cannot be stolen, neither is another Man's Slave properly said to be stolen, unless Gain is made by it: But it is *Man-stealing*, when he is persuaded to run away from his Master, or when he is concealed after he hath run away from him.

The ^z *Punishment* was Fine and Condemnation to the Mines, but at last *Death*.

^z I. 4. 18. 10.
D. 48. 15. 1.
& 7. C. 9. 20.
7. & 16.

As by the Divine Law, Exod. xxi. 16. Deut. 24. 7. And so it is by the Canons, c. 1. X. de furtis.

In England the stealing of Men or Children (called Kidnapping) is punished by Fine, Pillory, &c.

XX. ^a *Crimen ambitus* is committed by getting into publick Offices with Money or other Gifts. If the Plaintiff or Defendant made Visits to a Judge while their Cause was depending before him, they might be accused of *Ambitus*. This Crime was so far abolished, when the Senate transferred all Power upon the Prince, that those about the Prince might bring an Action on a promise of a Reward for their Vote, or for their assistance in obtaining an Office for another. But this too afterwards was taken away by ^c *Justinian*, and the Laws against *Ambitus* restored.

^a D. 48. 14.
1. 1.

^c Nov. 8. c. 1.
& c. 7.

In the Canon Law the Crime of Simony hath great Affinity with it. Tit. X. de Simonia.

At this Day there is little or no regard to the Laws concerning this Crime. In France Offices are publicly sold, and the Practice is universal. Matth. de Crim. Tit. 11. cap. 1. num. 3. *This Crime is with more reason prohibited in a Democracy than in a Monarchy.*

In England the Statute 5 & 6 Ed. 6. cap. 16. restrains the buying some places which concern the Administration or Execution of Justice, or Offices concerning the King's Revenue, &c. The 31 Eliz. cap. 6. restrains the buying of places in Colleges, Hospitals, Schools and Spiritual Benefices.

XXI. ^d *Crimen Fraudatæ Annone* is committed by abusing the Markets, as by raising the price of Victuals, forestalling, monopolizing, &c. For *annona* signifies Victuals, and all that is necessary for the sustenance of Man, which might supply the Publick for a Year. It is generally lawful for every Man to sell his Commodities where and to whom he pleases; yet when it is prejudicial to the Publick,

^d D. 48. 12. 2.

D d d d

that

that Liberty ought to be restrained for the good of the whole Body. The regulation of Fairs and Markets is of extraordinary Consequence to the Poor. Officers were appointed for that purpose, and to inspect the Weights and Measures that they might not be cheated;

⁴ D. 48. 12. 2. The ^c Punishment was twenty *aurei*, and more according to the quality of the Offence.

Vide the English Statute, 5 & 6 Ed. 6. ch. 14. concerning Fore-stallers, Regrators and Ingrossers.

Besides Theft, Rapine, Damage, Injury (of which I have spoken only as private Trespasses, though they might be repeated in this place on the score of a criminal prosecution) there are Crimes to which no certain Punishment is annexed, and therefore are called Crimes extraordinary, as,

¹ D. 47. 11. 4. 1. The Crimes of procuring ^f Abortion either by Medicines, or
D. 48. 8. 8. Blows upon an Infant conceived, but not form'd into human Shape.
D. 48. 19. 38.

5:

[Vide Exod. xxi. 22.]

If the Life of the Mother could not be preserved without Abortion, it is no Crime to carry off the *fetus* by Medicines.

² D. 47. 11. 9. 2. ⁸ Threatning Death or Bodily hurt. This Crime was called *Scopelismus* (*ἀσκοπελίζειν* to threaten or endeavour the Death of any one) from a Custom amongst the *Arabians*, of erecting Stones upon the Land of the Person with whom they were angry. ^h Here the Person threatned might demand Security for his preservation.

Vide Book 4. ch. 4. Of Imprisonment.

¹ D. 47. 11. 10. 3. ⁱ Digging or breaking down the *Damms* of publick Rivers.

^k D. 47. 11. 4. 4. ^k Pretended *Conjurers* and *Mountebanks* were punished at Discretion for any Damage they did to the People.

11. 5. A Violation of the *Tombs* and *Sepulchres* of the Dead, which was ^l committed by digging, pulling down, and destroying the Monuments of the Dead, by ^m robbing and stripping the Bodies, or misusing the Carcass or Bones, hindring the Body from Burial, &c.

ⁿ D. 47. 12. 2. 6. ⁿ Concussion, whereby one is frighten'd to give Money or any other thing by a pretended Command of the Magistrate, or by threatening to be Witness against one, by misusing Power in an Office to extort Money, &c.

^o D. 47. 14. 1. 7. ^o *Abigeatus*, or a driving and stealing Cattel out of a Herd or Flock, or out of the Fields or Inns, viz. ^p one Horse or Ox, four Hogs, ten Sheep or Goats at once, or at several Times. If the stealing is of a less Number, it is punished as a common Theft.

^q D. 47. 14. 1. 4. ^q But if there is a colour of Property in the Driver, it is no Crime.

This Crime is not distinguished at this Day from Theft, and the Number does not enhance the Punishment. Groenw. de LL. Abrog. in D. 47. 14.

^r D. 47. 15. 1. 1. 8. *Prevarication*, where the Informer colludes with the Defendant, and makes a feigned Prosecution. This may be extended to the

the Advocates of the Plaintiff or Defendant, who betray their Client's Causes.

9. ^a *Receiving* or harbouring of *Thieves* or other Criminals knowingly, or letting them go away when they might be apprehended. The Punishment may be mitigated if the Thief is received by his Kinsman; and it ought to be remitted wholly in case of Children and Parents, Husband and Wife, if they only receive each other, and do not take part in the Crime. But if there is no relation between the Criminals, the Receiver ought to be punished equally with the Thief. D. 47. 16. 1. D. 47. 16. 2.

By the Laws of England if any Person shall receive or buy knowingly any stolen Goods, or knowingly harbour or conceal Felons, he shall be taken as accessory to the Felonies; and being convicted shall suffer Death as a Felon. 5 Ann. c. 31. And he may be prosecuted for a Misdemeanour before Principal convicted. 1 Ann. c. 9.—5 Ann. c. 31. § 25.

10. ^a *Night-Thieves* are also punished *extra ordinem*, and more severely than common Thieves, because of the great opportunities of stealing, and the terror which they bring on Men when asleep. D. 47. 17. 1.

Balnearii are those that steal the Clothes of Men while they are bathing, and are punished severely; for a great Contumely is offer'd to the Persons robb'd, when they are forced to go home naked. So the *Saccularii* or Cut-purses; for this sort of Theft is easily committed in Crowds. *Directarii* are those that lay lurking in Houses in the Evening with intent to steal. *Effraiores* are House-breakers. *Expilatores*, are those that rob and strip People in the Streets or Houses. All which are punished according to discretion. D. 47. 11. 7. D. 47. 18. 1. 1. 2.

Vide of Theft ante p. 255.

11. ^a Those that corrupt and entice *Bondmen* by giving them ill counsel, by receiving them into their Houses; which may be extended to the debauching of Children and Servants in respect of their Fathers and Masters. ² For this reason Bawds and Whores may be expelled out of Cities. D. 11. 3. 1. & § 2, 3. Nov. 14. c. 1.

12. ^a *Pillaging* and *plundering* the *Inheritance* of a deceased Person before the Heir hath taken possession of it. D. 47. 19. 1.

13. ^b *Stellionate* (*à Stellione* a sort of a Lizard with variety of spots, a great Enemy to Mankind) is all kind of Cosenage, and Knavish Practices in Bargaining, and all Sorts of Fraud which hath not a particular name in the Law. For there being so many methods of cheating, it was impossible to find out particular names for every *Species*; therefore this one general name hath been invented where the Particulars do fail. And it hath as universal a signification in Criminal Causes as an *Action of Deceit* hath in Civil. It differs from the Crime of *Falshood*, because in some cases certain Punishments have been appointed for that Crime. D. 47. 20. 3. 1.

In England Crimes without a certain name are call'd Misdemeanours or Trespasses.

^c D. 47. 21.
1 & 2.

14. ^c Removing *Landmarks*; which by the ancient Heathens

[*And by the Mosaick Law, Deut. xxvii. 17.*]

was esteemed an act of great Impiety.

^d D. 47. 22. 1.

15. ^d *Unlawful Companies* are also punishable. Such are those which are erected without the Prince's Authority. If there is not due care in the Government of them, the Members will naturally be engaged in Factions, and given to excesses in eating and drinking in separate Meetings. ^e Three at least make a *College* or *Company*; for if it should consist of two only, there could be no end of Controversies upon a disagreement on the publick Affairs.

^e D. 50. 16.
85.

^f D. 47. 22. 3.

The ^f *Punishment* of Unlawful Companies may be a dissolution. Upon which they may divide the publick Goods amongst themselves. Or the Punishment may be a pecuniary Mulf, or every Member of them may be put to Death if it appears to be a Conspiracy against the ^g Government.

^g D. 48. 4.
1. 1.

Vide antea. *Of Corporations*; p. 135.

16. *Perjury* is a design'd lye confirm'd with an Oath. The Law takes no notice of false swearing in common Conversation, thro' ^h Passion or Surprize, but leaves it to God to revenge it.

^h C. 4. 1. 2.
D. 47. 20. 4.

Otherwise by the Laws of England, 6 & 7 W. 3. cap. 11.

ⁱ D. 12. 2.
13. 6.

ⁱ Perjury must be committed with deliberation in a Court of Justice; or out of it.

By the Laws of England Perjury can be committed only in Judicial Proceedings, and where the Oath is administred by a lawful Authority. 3 Instit. 164.

Observe that the Civil Law did not punish Perjury committed in Swearing by the name of God, firmly believing that the Wrath of God would be severely executed against the Offender.

^k C. 4. 1. 2.

^l D. 12. 2. 13.

^m D. 2. 4. 41.

ⁿ C. 12. 1. 17.

The ^k *Punishment* of Perjury by the *safety* of the Emperor is Death; by the ^l *Genius* of the Prince, beating and scourging; by the name of ^m God in Civil Causes, *Infamy*; ⁿ sometimes a deprivation from a Dignity. But it is generally allow'd that the Judge has Power to punish extraordinarily.

The Divine Law, Deut. xix. § 19, 20, 21. prescribes a most excellent and rational Punishment for Perjury, encreasing the Punishment even to Death, if the Malice of the Offender design'd it: But by the Common Law of England the most malicious Perjury does escape Death. It is usually corrected by Fine, Pillory, Whipping, &c. Vide 5. Eliz. cap. 9.

The Doctors on this subject enquire if the swearing falsely was by design or mistake, whether it was prejudicial to any Person or not; for it cannot be presum'd that one should commit Perjury without design; whether the matter was difficult and intricate upon which the Party answer'd and was examin'd, whether the Oath was positive

or upon belief; if upon belief, whether it was upon the Deponent's own Fact or not; whether it was upon a late Fact or something done long ago; whether the Oath was Judicial or Extrajudicial; for the Law will not encourage the giving or exacting Extrajudicial Oaths, so as to punish the breach of them with the penalty of Perjury, lest this should be a snare upon Mens Consciences; whether the Oath is assertory or promissory, as the Oath of publick Officers; whether the Heir may be punish'd for Perjury that does not fulfil the Oath of the Testator; whether the Oath relates to the principal Fact, or some extrinsical Matter not pertinent to the point in question, for then he that swore shall not be punish'd for Perjury, because there seems to be no Malice or Design, tho' a lesser Punishment ought to be inflicted; whether the Perjury touches a Man's Life, his whole Estate or part of it; whether the Oath was administred to a Defendant in a Criminal Cause (as is the practice throughout Italy, J. Clarus Lib. 5. qu. 45. num. 9.) or in a Civil Cause, &c.

17. ° *Exposing* of an Infant may be punished, when it is enquired ° C. 8. 52. 2. whether the Fact was done in publick ways that Passengers might take pity and preserve it, or in a Desert that it might dye with Hunger or be destroyed by wild Beasts; for then it is Murther or Parricide. The Punishment of young Women might be mitigated, who being deluded and debauched have left their Infants in the Streets for fear of shame, to be provided for by the Magistrate; for it is such a shame which any one might be tempted to avoid in that manner. P The Infant when found may be presum'd to be Legitimate; P C. 8. 52. 3. for the necessity of poor and honest Parents hath often forced them to take such Methods.

See the English Statute 21 Jac. 1. 27. To prevent the destroying and Murthering of Bastard Children.

18. ° *Vagabonds* and sturdy Beggars who refuse to Work, ought to be severely punished. ° Nov. 80. c. 5.

There are few or no Beggars in Holland. Groenw. de. Legibus Abrog. in Cod. Lib. 11. Tit. 25. See the English Statutes concerning Vagrants. 39 El. 4. & 17. 1 Jac. 4. 7 Jac. 4. 21 Jac. 28—11 & 12 W. 3. c. 18. 1 Ann. 13. 5 Ann. 32. 12 Ann. ch. 23.

19. ° *Prison breakers* also may be punished *extraordinarily* according to the discretion of the Judge. It ought to be consider'd whether the Prisoners escaped by Conspiracy, and Force, or by consent and negligence of their Keepers; if by consent and negligence of the Jaylors, then the Punishment may be less severe. It matters not whether the Prisoners were guilty of the Crime for which they were committed or no, for the breaking of Prison is a Crime. ° D. 47. 18. 1.

20. ° *Soldiers* that desert may be punished with Death, or corrected when it has been examined what their station was in the Army, their post, pay, the time of deserting, their number, their former behaviour, &c. ° He that deserts in time of Peace ought to be punished more mildly than he that deserts in time of War. ° D. 49. 16. 5. ° 5. 1. 1.

C. 8. 17. 7.

21. " Taking of *unlawful Pledges* or Distresses; as when a Creditor takes the Oxen off the Plow, or the Carts or Plows or other Instruments of Husbandry, when he might have had sufficient Pledges from other Goods. For by such acts the publick Trade is stopp'd, and the Debtor render'd incapable of paying publick Taxes.

C. 40. 40.
1. 2.

22. Unlawful " *buying of Purple and Silks*, for it was a Habit only for the Prince; and it is an indignity offer'd to him if private Persons appear in the same Dress. Besides if such Luxury was suffered amongst the common sort, the Coin of the Nation might be exported to those who were Enemies to Rome.

C. 5. 59.
1. un.

23. P *Monopolizers*, or Persons combining to engross and to raise the price of Goods.

Vide ante p. 234.

D. 47. 11.

24. Those that *attempt* the *Chastity* of another Man's Wife, Son or Daughter, though without success.

D. 47. 11.
1. 1.

25. " Those that defile and pollute the publick *Waters*, or damage the Pipes; with many other Crimes of an inferior Nature, which the Judge may punish *Extra ordinem*, or at discretion, either with the highest Punishment, " Death,

D. 48. 19.
13.
D. 48. 11.
7. 3.

[*Otherwise in England.*]

or some corporal Pain, or pecuniary Mult as the Fact shall require.

The Judge has not an arbitrary and extraordinary Power to condemn or absolve at his Pleasure; but *such* an arbitrary Power is entrusted with him that he may *lessen* or *encrease* the Punishment when he sees reason for it, and when a particular Punishment is not assign'd by the Law.

C H A P. XI.

How Crimes are Extinguished and Abolished.

CRIMES are extinguished,

D. 48. 19.
28. 6. & 1. 34.

1. By *Suffering* Punishment; for as Debts are discharged by Payment, so Obligations to the Publick for disturbing Society, are discharged when the Criminal undergoes the Punishment affixed to the Crime. And as it is unjust that a Debt should be twice paid, so it is unreasonable that one should be punished twice for the same Fault. " If one undergoes a Punishment less than the Law directed to be inflicted, yet if such a Punishment is inflicted as the Judge pronounced, the Criminal ought to be discharged; for if the Sentence had been severer than the Law required, the Officers would have executed the same, and that Sentence must have been obey'd.

D. 44. 2. 6.
D. 42. 1. 14.
& 45. 1. 1. 55.
1. 62.

2. " By *Acquittal* or *Absolution*, which if once pronounced, the Criminal cannot be accused again of the same Crime; " tho' he afterwards confessed that he was guilty of the same Crime. If a Son
was

was first accused of Homicide for killing his Father, he may be afterwards accused of *Parricide*, for they are Crimes of a different Nature.

Vide postea, of *Accusation*.

3. ^e By the natural *Death* of the condemned Criminal, except in ^a D. 48. 1. 6. some particular cases. ^f If he laid violent Hands upon himself ^f D. 48. 21. through fear of Punishment, the Crime is not extinguished. 3. 8.

4. By *Prescription* or lapse of ^b twenty Years without accusation; ^c C. 9. 22. 12. not but that there are limitations of a shorter date for several Crimes. As Prescription is necessary in Civil Causes to quiet the *Possessions* of Men, so it is as necessary in Criminal Causes to quiet the Minds of Men, that both their Possessions and Lives may not be uncertain.

In North Holland all Crimes except Murther, House-burning and Theft are abolished by prescription after a Year and a Day without accusation. Groenw. de LL. Abrog. in. C. 9. 22.

If the Person is accused, and not brought to ^b Tryal within two ^b C. 9. 44. 3. Years at the farthest, he is to be discharged from that accusation.

Amongst the English Statutes see an excellent Law call'd the Habeas Corpus Act, 31 Car. 2. ch. 2. whereby Criminals committed for Treason or Felony, shall be indicted the next Term, or let to Bail.

5. By ⁱ Pardon of the Prince, in respect of the former Merits of ⁱ D. 1. 4. 1. the Person or his Family, or without assigning any Cause at all. C. 1. 19. 7.

It is contended that the Prince ought not to pardon those Crimes which the Divine Law and right Reason directs should be punished; for that the Prince is only free, and above positive Laws, but not above the Divine or Natural.

If a Pardon does issue forth in some cases, a question is made whether Judges ought not to interpret them with all imaginable strictness ^k contrary to the common rule. ^l It is agreed that inferior ^k D. 1. 4. 3. Magistrates or Judges have not a power to pardon. But in the ex- ^l D. 48. 18. 1. 27.amination of *Pardons* the Judge ought to take notice whether it is ^l D. 48. 19. 27. *general* or *special*, whether it restores to Honour, Reputation, Estate and the mean Profits, or only the value of the Estate, if the Exchequer hath sold it; whether the Pardon is to the prejudice of a *third* Person, &c.

Thus, 1. Of the nature of Obligations, Contracts and Covenants in *general*. 2. Of the Nature of Obligations from Contract in *particular*. 3. Of the Extent of Obligations arising from *private Trespasses*. And 4. Of the Extent of Obligations from *publick Crimes*. I shall proceed directly to give a brief Account of *Actions*, or of the nature of Judicature, the third *Object* of the Civil Law, which arises from These Obligations.

^k Beneficium Imperatoris quod à Divinâ ejus indulgentiâ proficiscitur quàm plenissimè interpretari debemus. D. 1. 4. 3.

BOOK IV.

CHAP. I.

Of Actions or Judicature; and therein of a Judge, Plaintiff and Defendant, Advocates, Proctors, Notaries, Apparitors.

THE Knowledge of the Law is to little purpose if Men cannot be forced by it to do Justice. Therefore Courts were erected to hear Complaints, that Controversies might be debated and determin'd. Necessity contriv'd it * that Men might not be Judges in their own Concerns; for tho' they would intend to Judge uprightly, yet there would be such a Bias on their Minds that it would be very difficult for them to judge without partiality. ^b But this power of judging in one's own case must be allow'd to the Emperor, because an inferiour Magistrate hath no coercive Power over him.

* C. 3. 5.

^b D. 4. 8. 4.

A Trial (*Judicium*) is a legal Debate upon a Controversy before a Competent * Judge. It must consist of *Persons* necessary to the Trial, of the *Cause* or Question to be try'd, and of a *form* or certain manner of proceeding to prevent Disorder and Confusion. The Tryal may be either *Civil* or *Criminal*, or *Mix'd*, i.e. partly Civil, and partly Criminal; *Plenary* or † *Summary*, i.e. without the Form and Solemnities, requisite in a plenary Trial; unless they are of absolute necessity. It is also *Secular* or *Ecclesiastical*. These Hints being observed concerning Judicature in general.

I shall shew 1st, What *Persons* are requisite to a Trial in Judicature. 2^{dly}, I will speak of the *Cause* or the Question to be try'd, with the nature of Proof. 3^{dly}, Of the form and manner of the proceedings in Civil and Criminal Causes or Tryals.

The *Persons* necessary in Trial are, the *Judge*, the *Plaintiff* and the *Defendant*. ^c Without these there can be no Court. *Advocates*, *Proctors*, *Notaries*, and *Apparitors* may be the Assistants.

^c D. 5. 1. 62.

Of a Judge.

^d D. 42. 1. 5.

^e D. 1. 21. 1.

^f D. 1. 21. 5.

^g C. 3. 1. 5.

I. ^d The *Judge* is a Person appointed by publick Authority with a Jurisdiction, or as heretofore without a Jurisdiction.

A ^e Jurisdiction is a power of hearing and determining Causes Civil or Criminal, or both. And this may be an *ordinary* Power or Jurisdiction subsisting of it self, or a *delegated* Power deriv'd from the ordinary Jurisdiction, on which it does depend. ^f He that has a delegated Power cannot depute or delegate another, unless he derive that Power ^g immediately from the Prince; because a Prince may be

* Ubicunque causæ cognitio est, ibi Prætor desideratur. D. 50. 17. 105.

† Omnia quæcunque causæ cognitionem desiderant. per Libellum expediri non possunt. D. 50. 17. 71.

be understood to give a Jurisdiction without reserve, or without retaining back a Power to hear private Causes, when so many publick Affairs employ his whole time.

There was also *Judex Pedaneus*, who had no Jurisdiction at all, but might be appointed to hear the lesser Causes, without giving Sentence, or at least without power of ^h executing the Sentence. ^h D. 42. 1. 5. ⁱ C. 3. 3. t. t. Nov. 82. ^k D. 50. 16. 99.

ⁱ This Authority was call'd *Notio* not *Jurisdiction*, ^k tho' otherwise *Notio* might include *Jurisdiction*.

But this Authority of a Judex Pedaneus is out of use at this day. Groenw. de Legibus Abrog. in C. 3. 4.

^l There is *Merum Imperium*, where a Judge has the Power of ^l D. 2. 1. 3. the Sword only to punish Malefactors without Jurisdiction, which heretofore could not be delegated.

[*This Merum Imperium is also obsolete.* Groenw. de Legibus Abrog. in D. 2. 1. 3. and might be delegated by the Canon Law, c. quod sedem. De offic. ordin.]

Or *Mixtum Imperium*, where there is a Jurisdiction annexed to it.

There is moreover *Jurisdiction Contentiosa*, or Judicial, which is exercised upon Persons whether they consent to it or not; or *Voluntaria*, which may be used at all times without any manner of contradiction; as Emancipation, Adoption, Manumission; and ^m several ^m D. 50. 17. other legal Acts granted by the Judge upon request, and by consent ⁷⁷ of all Parties.

If any exception lies against the Jurisdiction of a Judge, it ought to be made ⁿ before *suit* is contested; for if the Defendant answers, ⁿ D. 5. 1. 30. he hath submitted to the Authority; ^o and tho' the Judge has not ^o D. 5. 1. 5. Jurisdiction over me, yet I ought not to condemn his Authority, but must appear upon summons and plead the exception; ^p unless it is ^p D. 2. 1. 20. most apparent and notorious that the Defendant is not subject to that Authority.

^q For Clergy-men ought not to be conven'd but before their Bishop, and Scholars in the Universities only before their Rector. ^q C. 4. 13. auth. habit.

[*In England, France and Holland Clergy-men are subject to Lay-Judges.*]

But if once the Jurisdiction is allow'd, all those things are allow'd and granted which are necessary for the due execution of it; as a coercive Power, &c. ^r for the grant of a Jurisdiction without a power to execute the Sentence, is null and void. ^r D. 2. 1. 2.

^s The Judge ought to confine himself within his own Power and Jurisdiction. But if the Defendant lives and resides within his Territory, ^t the Actor or Plaintiff, tho' of another Jurisdiction, must ^t C. 3. 13. 2.

F f f f commence

^m *Nemo potest gladii potestatem sibi datam vel cujusvis alterius coercionis, ad alium transferre.* D. 50. 17. 70.

Extra territorium Jus dicenti impune non paretur. D. 2. 1. 20.

ⁱ *Factum à Judice quod ad Officium ejus non pertinet Ratum non est.* D. 50. 17. 170.

commence his Suit in that Court to which the Defendant is subject.

- ^a D. 5. 1. 19. ^a The Heir also of the Deceased may be sued as Heir in that place where the deceased Person resided, because they are as one Person.
- ^w D. 5. 1. 19. And sometimes the Judge has Jurisdiction over Strangers, ^w because the *Contract* was made within his District where the Witnesses reside, or at least because the ^x payment was agreed to be made there.
- ^x C. 3. 18. 1. Sometimes because the *Crime* was committed in his Province; for it is fit the Criminal should be punished in that place where he had given the bad Example. ^z And he may be prosecuted for it tho' absent, ^a or the Judge may send Letters to another Judge to apprehend him, and to send the Criminal back to him; ^b unless he has taken Sanctuary in a Church.
- ^a C. 3. 15. auth. quæ in prov.
- ^a Nov. 134. c.
- ⁵ C. 3. 12. 2.

See Exod. xxi. 12, 13, 14. Deut. xix. 1, 2, 3, &c. In England the Privileges of Sanctuaries are abolished, 21 Jac. 1. ch. 28. as before observed.

- ^e C. 3. 19. 3. ^e Sometimes the Judge has Jurisdiction because the Thing in Controversy, whose Title or Possession comes in question, is *situated* within that Territory.
- ^d D. 5. 1. 12. ^d One that is *deaf* or *dumb* ought not to be a Judge, nor if he is under the age of eighteen Years; but if he is above twenty Years old he may ^e be forced to it, for it is a ^f publick Office. ^g One blind may be suffered to *continue* in his Office. ^h Those that are *infamous* by Law, Women, Bondmen, and ⁱ Soldiers (unless in Military Affairs) are incapable.
- ⁱ C. 3. 13. 6. But tho' the Judge is qualified, he may be ^k refused if justly *suspected* of partiality. This Exception must be made before Suit is contested, otherwise the Judge is allowed; ^l unless a cause of refusal does afterwards arise. He that refuses him ought to ^m exhibit the cause of refusal before the Judge himself, and afterwards prove his Reasons of *refusal* before *Arbitrators* chosen to examine the Charge.
- ¹ D. 5. 1. 17. ⁿ Therefore if a Judge has any interest in the Cause or is corrupted by Bribery, or a known ^o Enemy to one of the Parties, or of ^p Kin to either, (for a Father ought not to judge between those of his own Family and a Stranger) or if the Judge was formerly ^q Advocate or Counsel in the same Cause, or if he ^r was named by my adversary, &c. If these Allegations are proved, the Cognizance of the Cause ought to be committed to other Judges, or transmitted to a Superiour.
- ^m C. 3. 1. 16.
- ⁿ D. 5. 1. 17.
- ^o D. 40. 12.
- ⁹ D. 2. 1. 10.
- ^q C. 2. 6. 6.
- ^r D. 5. 1. 47.

By the Common Law of England Judges cannot be challenged. 1 Institut. 294. a.

A Judge has *Officium Merum & Nobile*, which he exercises of his own accord in Criminal Matters or in Civil Causes, where he may decree many Things (which are not contained in the Libel) as incidents to the Principal Affair; or *Officium Promotum & Mercenarium*, which he exercises in Civil Cases at the request of a Party, and it is the same with the Action; and therefore called *Mercenarium* because it must attend upon it.

The

The *Duty* of the Judge is to administer Justice to all that ask it. ^a according to Equity, not according to strict Law; to hear both ^a C. 3. 1. 8. Parties with Patience. ^b He ought to ask the Parties if they would ^b C. 3. 1. 9. urge any thing more, ^c and assist them in point of Law. ^c He must ^c C. 2. 11. admit *that* in Evidence, which is relevant, and reject that which is ^d D. 1. 18. impertinent. He ought to be easy when addressed to, but not fa- ¹⁹ miliar. His Countenance ought not to discover his Opinion; nei- ther let him shew an uneasiness against Persons which he knows to be of ill Fame, or a tenderness for those in Affliction, or for those that are full of Entreaties. ^e He ought to finish every *Criminal* ^e C. 3. 1. 13. Cause within *two* Years, and every *Civil* Cause within *three* Years. *These* are usually more abstruse, and the Defendant is not forced to be under confinement, or in Prison while it depends, as in Cri- minal Causes. The Causes of the Exchequer may be allowed lon- ger time.

If after appearance and contestation of Suit, one of the Parties doth contumaciously withdraw himself; the Judge may notwithstand- ing proceed to Sentence, ^f though regularly no Decree ought to ^f D. 42. 1. 47. be made against one that is absent. ^g D. 48. 19. 5.

^h The Judge ought to proceed according to the Allegations and ^h D. 1. 18. 6. Proofs laid before him, and not according to his own Knowledge ⁱ of the Fact; for he is to judge as a publick Person, not as a private one; and he ought not to be Judge and Witness. Neither ought the Lives and Fortunes of Men to depend upon the pretences of his own knowledge. In such a case, the Judge ought to lay aside his Office for a time, and become a Witness.

[Others contend that the Judge ought to proceed according to his Knowledge and Conscience against the Proofs; for that nothing can be proof to a Man against his own Knowledge.]

But when he judges, it ought to be ^a according to Law and Cu- ^a I. 4. 17. stom, not by Precedents or ^b Examples; for he must not consider ^b D. 1. 18. 12. what is done at *Rome*, but what ought to be done there. ^c C. 7. 45. 13.

If a Judge determines ignorantly, and against Law, ^c *litem suam* ^c I. 4. 5. *facit*; and he must answer for the Damages to the Party injur'd.

[This is out of use. Groenw. de LL. Abrog. in Instit. 4. Tit 5.]

If he advances new Law, the ^d same may be made use of against ^d D. 2. 2. 1. him upon occasion.

[This is also obsolete.]

^e He ought not to receive Presents, or buy or enter into any Con- ^e C. 1. 53. 14. tract in the place where he exercises his Jurisdiction, unless for things ^f 1. 2. of mere necessity; for he ought to be free from the suspicion of Guilt.

A Judge

^a Placuit in omnibus Rebus præcipuam esse Justitiæ æquitatisque quam stricti Juris, Ratio- nem. C. 3. 1. 8.

^b Non exemplis sed Legibus Judicandum. C. 7. 45. 13.

^c Quod quisque Juris in alterum statuerit, ipse eodem jure utatur. D. 2. 2. 1.

- ^f D. 1. 22. 1. A ^f Judge may have his *Assessor* skilful in the Laws to assist him.
^g D. 1. 22. 3. The *Assessor* ought not to sit in that Province where he was born, because he may be tempted to favour his Kindred and Friends, and to be severe against those that have disoblighd him. ^h Yet this may be suffered by the special Licence of the Prince.

By the Laws of England no Justice or other learned in the Law shall be a Justice of Assize in the County where he was born, or doth inhabit, in pain of 100 l. This Statute doth not extend to Officers in Corporations, nor to any Justice of the one Bench or the other, 32 H. 8. 24.

- ⁱ D. 48. 19. 11. ⁱ And lastly, the Judge must not affect to be thought good natur'd or morose, merciful or severe, but let him act with Calmness as the Law directs.

- ^k Nov. 82. c. 9. The ^k ordinary Judges have their Salaries from the publick Treasury, but the *delegated* and inferior Judges have a certain *Sportula* allowed them from the Parties litigant; ^l unless the Suit is commenced by poor Persons, for then they are excused from the payment of it; and so is the adverse Party excused too, for both ought to be in the same State, and to enjoy equal Privileges.

- ^m D. 1. 14. 3. ^m If a Judge is at last discovered to have been incapable of the Office because a Bondman, &c. yet his Acts are valid through the Necessity of their being so.

- The Plaintiff and Defendant. ⁿ D. 5. 1. 13. II. ⁿ The *Plaintiff* (*Actor*) is he that calls the Defendant to a Trial. In Criminal Causes he is called the Accuser. Every one has the liberty to be Plaintiff who is not made incapable by Law. For some are prohibited; 1. For ^o want of *Age*, as Minors without their Guardians or Curators, and a Sentence against them is null and void. ^o C. 3. 6. 1. & 2. But if the Sentence is for them, and no ^p Exception made against their Minority, the Decree is valid. 2. By reason of some defect of *Mind*, as Madmen, &c. 3. By reason of the *State* and *Condition*, as a Wife cannot be Prosecutor in a Criminal Cause, or Defendant in a Civil one, without the consent of her Husband, unless he is absent, and the cause of great Concern. Nor a Bondman, nor a Son under the power of his Father.

As to a Son, it is observ'd in France at this Day.

- ^q D. 48. 19. 17. 1. 4. ^q Some are prohibited as *Criminous*, viz. those that are in Banishment.
^r C. 3. 7. 1. ^r Regularly no one is forced to prosecute or commence an Action; but when he does sue, he must follow that Court and Jurisdiction, to which the Defendant is subject. ^s And after he hath commenced his Suit, he cannot let it drop or stand when he pleases without the consent of the Defendant, unless he is ready to pay the Costs. If a Plaintiff should summon his Father, Patron, &c. into the Court without Leave, ^t formerly he was punished by a Fine, or by some corporal Punishment; and if any one may bring his Action, he ought to take care not to demand *more than was due* to him; ^u for

ⁿ Quod non est Licitum in Lege, Necessitas facit Licitum. X. de Reg. Juris 4.

^a for if he did, he was fined for bringing the Action without a due Consideration. ^{C. 3. 10. 1.}

These Penalties are now out of use.

The ^a Defendant (*Reus, quia illius res agitur*, under which denomination the Plaintiff also was comprehended) is he against whom the Action is commenced. The Plaintiff is at liberty whether he will sue or not, but the Defendant may be forced to answer, ^b Yet ^c C. 4. 12. t. t. an Infant (without his Tutor) or a Madman cannot be a Defendant; neither may a Wife be conven'd for her Husband, or a Husband for a Wife, or a Father or Mother for their Son; unless the Contract was by their Order. ^{D. 12. 2. 3. D. 5. 1. 62.}

See before Book 1. Chap. 2. p. 117, 127.

The Defendant may force the Plaintiff to sue him in that Court to which he is subject, for the four reasons ^a above-mentioned. ^b Clergymen have a Privilege to be conven'd only before an Ecclesiastical Judge, and ^c Scholars before the Rector of the University. But what if the Plaintiff is also privileged? He must follow the Privilege of the Defendant if his Privilege is not of an higher Nature; ^b for upon Equality Defendants are to be more favoured than Plaintiffs. ^{V. p. 293. C. 1. 3. Auth. statuimus. C. 4. 13. Auth. habita. D. 50. 17. 125.}

The ^a nature of Man being apt to be litigious, it highly concerns the Conservators of the publick Peace to discourage Suits at Law. For Poverty usually attends a wrangling Humour, and the Publick suffers while the People are diverted from Trade and Commerce. Therefore that Actions may not be commenced upon trifling Pretences, and that Defendants may not dispute and oppose where there is a just Claim, three Remedies have been invented. ^{I. 4. 16.}

1. The ^a Oath of Calumny may be administered to the Plaintiff at the beginning of the Suit, whether Civil or Criminal. Here the Plaintiff swears that he does not commence his Suit out of Malice, but because he thinks that he hath Law and Justice on his Side. Here also the Defendant swears that he does contend, because also that he is persuaded that he has a good Cause, and that the Plaintiff hath no just Claim against him. And farther, both Parties must swear that they will not deny the Truth, nor create unnecessary Delays, or give the Judge or others any Presents or Gifts for the Victory in the Cause. If the Plaintiff refuses this Oath, the Defendant is dismissed; if the Defendant refuses, the Complaint or Libel is taken *pro Confesso*. ^{L. 4. 16. C. 2. 59. t. t.}

The Advocates formerly took this Oath, but at this Day it is much disused, it being thought sufficient that they take this Oath once at their first admission to practise. By the Canon Law a Proctor having a special Proxy, must take the Oath of Calumny too, and may swear in
Animam
 G g g g

^b *Favorabiles Rei potius, quam Actores habentur.* D. 50. 17. 125. *Non debet asserti licere quod reo non permittitur.* D. 50. 17. 41.

Animam Domini upon the Soul of the Client, c. 6. X. de Juramento Calumn. c. 2. eodem in 6. vide 132 Canon of K. James I. 1603.

2. ^e If the Plaintiff was cast, he formerly was fined a tenth part of the sum in question; but at this Day he that is cast must pay the other all Cost and Expences of Suit; unless the Judge shall see reason to moderate the Costs, or not to allow any at all, because there was a just and probable reason for litigating and contending. ^f Sometimes the Plaintiff was punished for demanding *more* than was due, and ^g sometimes the Defendant paid double for denying the Debt.
3. The third Punishment was ^h *Infamy*; by which the guilty Party was not to be esteemed in Law a Person of Credit and Reputation.

There is nothing of this nature in our Common Law Courts, but the Oath of Calumny may be demanded in our Courts, which are governed by the Civil and Canon Laws. Neither is the Oath of Calumny used in France. Groenw. de Legibus Abrog. in Instit. 4. 16. And as to the Punishment of Infamy, it seems also to be out of use every where. Ibid.

- III. An ⁱ *Advocate* is the Patron of the Cause, assisting the Litant upon Request with his Advice, and the Person who pleads or represents the Cause of his Client. *Postulare* signifies to plead for one's self, or another. ^k The Employment is honourable and necessary; and it is encouraged with several ^l Immunities and Privileges. It has the Privileges of Soldiers, to which Profession it is compared as absolutely necessary for the defence of the Commonwealth. ^m Therefore they ought not to be forced into publick Offices; ⁿ neither ought they to be interrupted in their Studies by Bra- ziers and other Trades of Noise, or by those Trades which create unwholsome Smells in the Neighbourhood; and on all Accounts their Privileges ought to be construed favourably for the good of the Publick.

- Whatever an Advocate says or does for the *good* of his Client it is valid; but if through Fraud or by Mistake any thing is ^o done to the *Prejudice* of the Client in his Absence, it may be revoked or cured by Appeal.

Some are prohibited *for a time* to be Advocates for themselves or others, as Minors under seventeen Years of Age; for it is not decent that those who are under Guardianship should govern others.

- Some may be Advocates for themselves only, as Women, &c. ^p Some are barred to appear in a *particular* Cause, as one cannot be Advocate in the same Cause in which he was before a Judge; unless upon an *Appeal*, for then the Judge may defend his own Sentence, and it is as it were another Cause.

- Those are to be *removed* from the Office of an Advocate, who bargain with their Clients ^r *de quota litis*, or for part of the thing in Controversy; for such Contracts are contrary to good Manners, *maintain* Cavils, and tend to the Suppression of Truth.

See Book 4. ch. 3. Of Cession of Actions.

* The Advocate that refuses to defend one of the Parties at the Nomination of the Judge, ought also to be deprived; for it is a publick Office. Neither ought a Judge to suffer all, or the best Advocates to be on the same Side, to the prejudice of another's Right. * An Advocate ought not to indulge himself in a way of Railing and ill Language: If he does and will not be corrected by Admonition, he may be fined or suspended, or removed. " So, if he is guilty of *Falsity*. Yet notwithstanding this Suspension or Removal, he may practise in other Courts where there is no cause of Complaint against him. " And he may be restored to practise in the same Court upon Satisfaction.

By the Canon Law Priests or beneficed Clergymen (though in the minor Orders) cannot be Advocates in secular Courts, except in Causes that concern themselves, their own Church, or for the Poor. But Monks or Canons regular ought not to plead in any Court, Ecclesiastical or Secular, unless by the Command of the Abbot for the Advantage of the Monastery; because they ought not to concern themselves with worldly Affairs, c. 1, 2, 3. X. Tit. de Postulando.

* If upon Examination the Candidates were found qualified to be Advocates, y they were admitted into the Number. Their *Salaries* (*Premia* or *Honoraria*) were not to exceed a hundred Crowns in one Cause, and if nothing is given or promised, yet there lies an Action for a Reward. " They may be forced to accept a Salary, and to plead for one of the Litigants, and whatever they urge and alledge, ^b it is reputed to be alledg'd by the Plaintiff or Defendant. " But in their Pleadings let them be mindful of their Oaths, and not undertake Causes manifestly unjust, or promote them if the Injustice is discovered in the midst of the Trial. But if the Cause is doubtful, the Advocate may proceed.

It is said to be laudable to defend a guilty Defendant in a Criminal Cause, but that expression ought to be applied with Caution, Exod. xxiii. 2.

^d But if the Criminal is notorious, as a famous Robber, &c. the Judges ought not to suffer an Advocate to plead for him.

By the Laws of England in Treason and Misprision of Treason, 7 W. 3. cap. 13. (but not in Felony) and all Cases that are not Capital, the Criminal is allowed an Advocate or Counsel. Vide postea, of Accusation.

* Though a Cause is just, the Advocate ought not to support it with Fallacies and Deceit to the suppression of the Truth, though they may defend themselves with Art against the Cavils of their Adversaries. ^f If they betray the Causes of their Clients, it is fit they should be rejected by all good Men, and punished as scandalous Prevaricators.

^g There was an *Advocate* and *Proctor* of the Exchequer chosen out of the Body of the most experienc'd Advocates, who had their Salary from the Publick. Their Duty was to manage the Causes belonging

belonging to the Prince and the Publick, and to prosecute Criminals.

Of Proctors.
h L. 4. 10.

IV. ^h Anciently every one pleaded his own Cause, except in some few publick or favourable Cases. But this being found inconvenient, the Parties were suffered to appear by Proctors, who were supposed skilful in the Management of their Affairs.

i D. 3. 3. 1.

A ⁱ Proctor is he that manages another Man's Cause by his judicial Authority and Commission. The Nature of an *extrajudicial* Proctor was before explained in the *Title of Authorities and Commissions*.

[Page 242.]

A judicial Proctor differs from the *Negotiorum Gestor*, because he (the *Negotiorum Gestor*) acts without a special Authority; and the Proctor differs from an ^k Advocate, because the Proctor manages the *Fact* of the Cause, and the Advocate the *Law* of it.

* C. 2. 7. 11. 1.

C. 20. 13. 11.

A ^l Minor cannot appoint a Proctor but by his Guardian; yet if the Minor hath constituted a Proctor, and obtained Sentence, his Age shall not be prejudicial to him.

m C. 2. 13. 11.

n C. 2. 13. 22.

After Suit is *contested*, the Proctor may appoint a *Substitute*, for before that Time he is not *Dominus litis*; and ⁿ then his Proxy cannot be revoked unless upon good Cause.

o C. 2. 13. 10.

p D. 3. 3. 2.

q C. 2. 13. 1.

The ^o Duty of a Proctor consists in diligently observing the bounds of his Authority; ^p and if he would act *besides* his general Commission, he ought to have a *special Proxy* for that purpose. And ^q if his Authority or Commission is questioned, he ought to give Caution *De Rato*, or that his Proceedings shall be ratified and confirmed. ^r The Proctor for the Defendant also (called *Defensor*) ought to give Security *De Judicato solvendo*, or to pay the Condemnation, if the Defendant does not give it himself.

r L. 4. 11. 1. &

2.

s D. 48. 1. 13.

A ^s Proctor may not be admitted for the Defendant in a criminal Cause in his Absence, where the Punishment is to be Capital or Corporal. But where the Crime is only fineable, a Proctor may appear for him. It would be ridiculous to punish the Body of the Proctor, or the Fidejussors instead of the Criminal; therefore the Criminal must be present in Person to receive his Punishment, which he would endeavour by all Methods to evade, if he was suffered to go at large. Besides the Judge may better find out the Truth from the Voice, the Countenance, the Constancy, the Fear, and in general from the Behaviour of the Criminal upon his Trial; which Observations could not be made if the Criminal was suffered to appear by others. ^t But if the Criminal appears, a Proctor may assist him in his Defence. The Accuser too formerly could not appear by Proctor.

t D. 48. 1. 13.

Though it is otherwise at this Day. And by Custom in Italy, an absent Person may be tried and condemned to Death. J. Clarus Pract. Crimin. quæst. 32. num. 11.

u C. 4. 39. 3.

D. 3. 3. 27.

There is a Proctor in ^u *Rem suam*, as when one assigns his Action to another, and the Assignee manages the Prosecution for his own Advantage.

Vide

Vide postea. chap. 3. Of an Appointment of a Proctor.

Corporations and politick Bodies must appear in all Causes Civil and Criminal by a Proctor, which is called a *Syndict*; for a distinct^w D. 3. 4. 1. Plea for every particular Person of that Body would be an intolerable charge to the Adversary.

V. The Office of a *Notary* is exercised about Contracts, Testaments and judicial Acts. Regularly no one can create these Officers but the Prince, * unless a Law or Custom hath invested Subjects with that Power; for the Authority and the Credit given to their Testimony is contrary to common Right.

If there is any doubt whether he that drew up the Instrument is a Notary, it ought to be proved by his Grant, or at least by Witnesses, that he is so reputed, and hath publicly executed that Office for some Time; which Evidence may be sufficient, y if the Person^y C. 10. 69. hath no Incapacity, or does not lie under any prohibition to act in that Station. ^z But if the Act was sped by him that really was no^z D. 1. 14. 3. Notary but only reputed such, the Act may be valid and sustained, because of the Necessity of it.

The Office is of a publick nature, and therefore the attestation of a Notary is credited in matters *Extrajudicial*, if the name of a sufficient number of Witnesses, that were present, are inserted in the Instrument; for if the Instrument is suspected, it ought to be proved only by them. ^b This Attestation ought to be effectual in the Words that are *Positive* and *direct*, not to *Narrative* or *indirect* affirmations, or to words by way of *Recital*.

But in *Judicial* acts (the proper business of this place) the original Writing of the Notary is proof without Witnesses; ^c but Copies of his Writing must be proved by comparison with the original, and by examination of Witnesses; ^d and if the Notary and Witnesses are dead, the Instrument may be prov'd by comparison of their Handwritings.

^e If a Notary certifies his own Fact, it is not valid as a Notarial act; for no one can be a Witness for himself.

^f The Minutes of the Notary are call'd the *Protocol* (*πρωτον κωλον*) and if his Minutes, Acts or Instruments are defective, the Judge may perfect or correct them in the examination of Witnesses, or setting down the Decree. If He is knowingly guilty of Misrecitals, he may be deprived and his Hand cut off as guilty of *Falsity*. ^g And *Judicial* Acts may be revoked, when any Fraud is proved and discovered in them.

The Attestation of a Notary about Contracts or Testaments, or about an Extrajudicial Act hath no greater force than that of any other Witness in our Courts of Common Law.

VI. *Apparitors* are the Ministers and Messengers of the Judges. ^h Their Duty is to obey their lawful Commands, to summon the Litigants to Court, to execute the Sentence and Decree, to go be-

H h h h fore

^h Qui Jussu Judicis aliquid facit, non videtur dolo malo facere qui parere necesse habet. D. 50. 17, 167. 1.

¹C. 3. 2. 3. fore the Judges bare-headed, to clear the way, &c. ¹ They may be punished or removed by the Judges for Misdemeanors.

They ought to arrest the Persons of Men without violence; unless they defend themselves with Arms.

¹C. 12. 41. ¹ They ought not to execute the illegal Commands of a Judge; for if they are manifestly illegal a private Person may resist them.

¹C. 3. 2. 1. ¹ Anciently it was an Office of Credit; for they lived in a Company, and had a Governour over them.

C. 12. 61. 2.

CHAP. II.

Of the Cause or Question to be Try'd, and therein of Proof in General, and of Proof in Particular, (viz.) By Confession, Presumptions, Witnesses, Instruments, and by Oath.

Of the Cause or Question.

¹C. 2. 4. 16.

¹D. 18. 1. 7.

¹C. 3. 12. t. t.

Of Proof in general.

¹D. 22. 5.

11.

¹D. 22. 5. 3.

¹C. 4. 19. 5.

6, 7.

¹D. 12. 2. 31.

I. ^m **A** Cause is the Controversy in question to be tried in a Court of Justice. It is either a question of *Law* or *Fact*. The question of *Law* arises from the Fact, and from the Merits of the Cause. It is to be decided by direct Law or Equity; ¹ for we must recur to the Judgment of an Intelligent and Good Man, where the Law is silent.

¹ Causes ought not to be tried on *Sundays* or Holy days.

In the Question of *Fact*, the *Evidence* of it is to be enquired after, which may appear from Proof.

Proof is either *General* or *Particular*.

II. ^p Proof in *General* is an Act which persuades the Mind, and, creates Belief in the Judge which hears the Cause, that such a Fact is true or false. Fact is the subject matter of proof; for Law is not to be proved but alledged, The Judge already does or ought to know the Law. Facts cannot be *presum'd* but must appear; therefore to know Truth, is to know what a thing really is and is not. Proof in Law is not so certain as proof in other Sciences; for it never amounts to a demonstration. As a Man may confess himself guilty when he is not guilty; and ¹ two Witnesses may depose falsely; which notwithstanding are both proofs in Law.

Proof is either (*plena*) a full proof, as by two Witnesses or a public Instrument; or (*semiplena*) an half proof, as one Witness or a private Writing; ¹ so that two half proofs being joined together (though of a different nature) make one full proof.

Therefore there is proof by *Law*, and proof adjudged to by *Man*.

Proof by Law is when the Law has determin'd what is proof; as when two Credible Witnesses depose the same thing; or when all Parties

¹ Factum à Judice quod ad Officium ejus non pertinet, Ratum non est. D. 50. 17. 170.
Extra Territorium Jus dicenti impane non paretur; idem est & si supra Jurisdictionem suam velit Jus dicere. D. 2. 1. 20.

Vim vi repellere omnes leges omniaque Jura permittunt. D. 9. 2. 45. 4.

Parties sign the Instrument of a Contract; there all shall be adjudged to be concern'd, and to understand what they have done.

Proof by *Man*, is a proof in the Opinion of the Judge; with which Power the Law hath entrusted him; as when there is only such imperfect Evidence attended with good Circumstances, which the Law hath not consider'd or ordain'd to be taken for certain.

It is always to be observ'd, that the proof lies upon him that alleges and *affirms*, whether Plaintiff or Defendant. * *For of a Negative Proposition there can be no direct proof.* ^{D. 22. 3. 2. C. 4. 19. 1. C. 4. 19. 23.}

That this Assertion may be better understood, consider that there is a Negative of *Fact*, of *Law* and of a *Quality*.

A Negative of *Fact* may be of a mere and *simple Fact*; as when one denies that *Titius* hath paid his Debt. This cannot be proved, so that in this case the proposition is perpetually true. Or it is a negative of *Fact* attended with *Circumstances* of Time and Place; as when one says that *Titius* himself did not pay the Debt yesterday at *Rome*: This may admit of proof, because it may be prov'd that *Titius* was all that day, far off in another place.

A Negative of *Law*, is when one denies a thing, *viz.* a Testament, ^{C. 14. 19.} &c. to be legally made. This may be proved by shewing what is wanting to the Legality of it.

A Negative of a *Quality* is when one denies that a Testator was of sound Mind and Memory, or that *Titius* is fit for such an Office, &c. This may be proved by shewing that the Testator was mad, or that *Titius* cannot write, is unlearned, deaf or dumb.

But in these cases the Negative is not directly proved but the Affirmative, from which a Negative conclusion is inferr'd.

In *Criminal Cases* the proof ought to be as clear, as the Sun at noon-day; especially where the Life of Man is in question. ^{C. 4. 19. 25.}

What is *Notorious* does not need proof, for that it self is undoubted proof; it being suppos'd to be done in the presence of the Judge in his Court; and in the presence of a number of Men.

But there is besides a *Notoriety of Presumption*; as that such a one is my *Father*; or that I am his *Son*; which cannot be proved directly; and a *Notoriety of Law*, which may be by a Judicial Confession, or by the Sentence of a Judge.

Observe in the Law General *Topicks* concerning *Proof*, or for framing *Necessary* or *Probable* Arguments.

You may find Arguments,

1. From an *Absurdity*; which is to be avoided, if a greater Absurdity does not follow. * As where one gives another a mortal wound, of which he languishes, and another afterwards at another time kills him outright. Now it would be absurd to say that both kill'd him at different times, but it would be a greater Absurdity to acquit them both or either of them. ^{D. 9. 2. 51.}

2. From the *Order* of words in a Sentence. For what is first spoke may be presum'd to be first in the Thoughts; and what is first written may be presum'd to be first done; tho' sometimes the order of words may be inverted that the principal matter may be supported, or

* *Ei incumbit Probatio, qui dicit, non qui negat.* D. 22. 3. 2.

* *Per rerum naturam Factum negantis probatio nulla est.* C. 4. 19. 23.

or when the Intention is discovered without weighing the order of words, or when it appears there was no design to put them in *Form*. This way of arguing is sometimes very conclusive, sometimes probable, but sometimes of no force.

3. From an *Etymology*, where the Argument is only probable, because words are not always expressive of the nature of Things.

4. From *General* words which operate upon every particular; unless the general words (circumstances considered) ought to be referr'd only to those things which were the Subject-matter.

• D. 50. 16.
25. 1.

5. From the *whole* to every part, where there is the *same* Reason, or where the whole is not of an individual nature.

6. From a *part* to the whole.

7. From *Vulgar Opinion* and the common way of speaking; which may sometimes be preferr'd to the proper signification of words, if it is not absurd, or if there is no Law restraining to the Grammatical sense.

• D. 9. 2. 32.

8. ^a A *Simili*, in that very *point* where the cases are alike. For where there is the same Reason there ought to be the same Law.

9. A *minori* or *fortiori* affirmatively. This holds good where the *greater* contains the *lesser* as a *species* or *part*, and where there are no restraining words to do only what is the least.

10. A *majori* negatively; for what is not lawful in Things of a higher nature cannot be lawful in Things of lesser consideration.

11. Arguments from Things *expressed* and *implied*, are oftentimes of equal force; tho' sometimes the express provision of Man takes away all implication by Law; and tho' sometimes too one may do that tacitely which he could not have done by express words.

12. From the *strict Reason* of a Law to a *restriction* of the general words; and so from a *general Reason* to a general *extending* of the words of the Law itself, if the Law is not penal and condemnatory; for then it may be safest to keep to the direct words.

13. From the *ceasing* of the Reason of a Law to the ceasing of the Law it self. For where the *final Cause* ceases, there the Effect ceases too.

14. From the *contrary Reason* and Sense of a Law, for then it is the same as if the contrary Reason was expressed in the Law. We cannot argue conclusively from the contrary and simple sense of the *Letter* of a Law or Sentence.

As, because He knew her not till she had brought forth her first-born Son; Matth. i. 25. It does not follow that he knew her afterwards.

15. From an Authentick *Rubrick* or Title of a Law; unless the Text is contrary to the Title.

16. From the *Subject-matter* of a Law; to which Words ought to be *restrained*, or *extended*. ^b For this Reason the *Copulative* may be interpreted to be a *Disjunctive*, and the Disjunctive a Copulative; ^c *oportet* may be put for *decet*, *debet* for *poteſt*, *Concorditer* for the major part, &c.

17. From a Duty that ought to be *reciprocal* or obligatory on both Sides; if it should oblige one Side.

18. From

18. From *Authority* of eminent *Lawyers*, &c. or *Presidents* of adjudged Cases.

19. From a *Privilege* or particular Case to shew that the contrary is of *common* Right.

20. From what *usually* comes to pass to a *Presumption* that a particular Case is after the *same* manner; if the contrary is not proved by the other Party.

21. From a *Repetition* of the same *Words* or the same *Act* to prove *Deliberation* and *Design*.

The Curious in this nice part of the Law may consult the Collections of the excellent Nich. Everardus in his Book entituled Loci Argumentorum Legales, which (for Brevity-sake) I recommend to the Student; having giving only a Taste of it.

III. Proof in *particular* may be either by *Confession*, *Presumptions*, *Witnesses*, *Instruments*, and by *Oath*. Of Proof in particular.

1. *Confession* is an *Acknowledgment* made by the principal Party, that the Debt demanded, or *Allegation* with which he is charged, is true. ^d And it is as valid as a *Sentence*, for the Party is as it were condemned by his own Decree. d D. 42. 2. 1.

^e But all *Confessions* are not to be esteemed a discovery of the Truth, if there are no other corroborating *Circumstances*. For sometimes Fear or a weariness of Life, or some other Reason hath induced Men to make *Confessions* of those Things which they were never guilty of. e D. 48. 18. 1.

^f A *Confession* shall only affect the Party himself, not his Companion or any other; for a Man despairing of his own Life, may through *Revenge* bring the Life of another in Danger. f D. 50. 17. 74. D. 11. 1. 11. 1.

All such *Confessions* ought to be upon a *Judicial Trial*; and before a competent Judge; for otherwise it is no more than extrajudicial Discourse; which amounts but to a half Proof. g C. 9. 2. 17. h C. 7. 11. 59.

It ought to be free and without Compulsion or Torture, ⁱ unless he confirms the same afterwards when free and at liberty. If it is obtained by promise of pardon it is not sufficient proof, for it was obtained deceitfully. But when the *Confession* is regular, and admitted by the other Party, he ought to admit the whole as it is qualified, and when it is extended to other matters which are done at the same time; unless there is a presumption against that part. ^k As when one confesses that he kill'd *Titius* in his own defence; the killing shall stand by it self as confessed, and the qualification must be proved, because the Law presumes design, and throws the proof upon the Criminal. But if the *Sentences* are distinct, where there is no presumption, the qualification afterwards comes too late, and infers that the Acts are done at different Times. i C. 9. 4. 2. k C. 9. 16. 1. C. 9. 33. 5.

To illustrate all by Example where there is no presumption of Law against part of the *Confession*. The Libel charges that you receive 100 l. of me. You answer, That you did receive 100 l. of me which I ow'd to you, and no other Sum; this is but one Sentence, and cannot be divided; for with one Breath I do as it were

l i i i

abso.

^d Confessus pro Judicato est. D. 42. 2. 1.

absolutely deny the Charge. But where the Sentences are divided, there the Confession shall be divided, and part accepted and part rejected. As if you had answer'd, That you did borrow the 100*l.* but that you have since repaid it: Or that I have promised not to demand it 'till seven years were past. The latter part of this answer must be proved, else you will be condemned. Perhaps you did not dare to deny the principal Charge for fear of being convicted of Perjury, and therefore advance something to avoid that Confession which cannot be proved to be an Invention.

¹ A Confession of Sickness at the point of Death is extrajudicial, but very solemn, and ought to have the force of a Judicial Confession, if Circumstances do concur with it: For in those cases there is no temptation to make such acknowledgments. ^m But if such Confessions or Sayings at the point of Death tend to the advantage of the Heir (as when the Testator declares in his Will that he owes nothing, &c.) this shall not avail, if the Creditors make but a common proof to the contrary.

ⁿ D. 42. 2. 2. ⁿ A Confession by mistake may be revoked.

2. *Presumption* is a conjectural proof upon a doubtful matter from probable Arguments. It is either a Presumption of *Law*, or of *Man*, i. e. the Judge.

1. A *Presumption of Law* is where the Law declares and orders from probable Reasons a Fact to be taken for true 'till it appears to the contrary. ^o As that he who is in possession has the best Title 'till a better does appear; That an ^p adjudged Case is true between the same Parties. This Presumption may be comprehended almost in three Rules. *First*, ^q *That those things which are required by Law or Nature, are presumed to be, and to have been annexed in doubtful Cases.* As that all things were done which are acknowledged by the Parties in Writing; That every Man is in his Senses, that all Men love their Children, &c. *Secondly*, ^r *That every thing is presumed to be without change in its last State and Condition.* As he that is once convicted to have been an infamous Person, shall be still presumed to have the same Designs, and to continue infamous. *Thirdly*, ^s *That if there is no reason to think otherwise, the Presumption ought to be on the best Side.* As that every Man is honest. This (I say) will admit of no Proof to the contrary.

But in a Presumption (*Juris & de Jure*) of *Law* and by *Law*, there is such a certainty supposed that a proof to the contrary will scarce be admitted. It is called a Presumption of *Law* and by *Law*, because the Law vehemently presumes a thing done or not done; and founds it self upon what it does only presume. As if a Man is contracted to a Woman and lies with her, the Law will pronounce for a Marriage, and it will not endure a proof to the contrary that there was no Marriage, as it will in a presumption of *Law* only.

6. A *Presumption of Man* arises wholly from the Discretion and Judgment of the Judge from the Circumstances of the Fact without any express Law to direct him. It is a Consequence upon a Fact, and as the Fact is certain or uncertain, so is the Consequence too. The Law gives the Judge this Power, and therefore it is called the *Presumption*

^t *Semel malus semper præsimitur esse malus*, 8 de-Reg. Jur. in-6.

Presumption of Man. But yet he ought to distinguish betwixt Presumptions that are rash, probable, violent and necessary.

By virtue of this Power, Solomon formed his Judgment in that Controversy betwixt the two Harlots contending for the Child, 1 Kings c. 3.

There is a difference *betwixt a Presumption and a Fiction.* For a Fiction is a supposition of Law, that something really is which is not. * So sometimes an Infant in the Womb is esteemed in Law to be born; and though the nature of things cannot be changed by a Fiction, yet the effect of things may be changed and applied as the Law thinks reasonable. " So he that died gloriously in Battel, is supposed always to live to some effects and purposes: And when a Man acts by another, he is supposed to act himself. In which Cases a Fiction will not admit proof to the contrary, as Presumption sometimes doth.

The Professors of the Common Law amongst us feign that a Ship arriv'd in Cheapside, Islington, &c. to draw the Cognizance of the Cause from the Admiralty, which is governed in part by the Civil Law. The Civilians say that this is absurd, because not founded upon Equity or Possibility; one of which at least is requisite to the nature of a Fiction. Ridley's View, &c. Part. 3. cap. 1. § 3.

3. A *Witness* is a Person called into a Court of Justice to declare to the Judge what he knows of the Fact under Examination. His Declaration is called his Testimony.

That a strict Inquiry be made into the nature of this proof by Witnesses. I shall shew *First*, Who are qualified to be Witnesses. *Secondly*, What number of Witnesses is required by Law to make a full proof. *Thirdly*, What ought to be the method in their production and examination.

1. Every one is qualified to be a Witness who is not prohibited by Law.

Some are forbidden because of a defect of the *Person* of the *Witness* himself, as because he is an *Infant* or *Pupil* under fourteen years of age, * who cannot depose even in *Civil* Causes, though they may depose afterwards what they knew while under that age. y A *Minor* under twenty cannot depose in a *Criminal* Cause; z for those years of a Man's Life are inconsiderate, and generally prone to evasions, attended with Confidence and Obstinacy. So *Madmen*, *Fools*, a *Prodigals* are prohibited, and b *Women* in a *Criminal* Cause if they have been convicted of *Adultery*; c *Criminals* condemned, or sometimes under an *Accusation* only, especially in cases that affect the veracity of the Party, as *Perjury*, *Forgery*, &c. *Infamous* Persons either in Law or Fact.

[By the Common Law of England one Attaint of Conspiracy, Forgery,

* Coram Titio aliquid facere jussus, non videtur Præsente eo fecisse, nisi is intelligat. D. 50. 16. 209.

Forgery, Perjury, or one duly set on the Pillory is not allowed a Witness. Hale's Pleas of the Crown, 263.]

- ^d C. 4. 20. 11. ^d A Companion in the commission of the Crime against his Fellow-criminal, unless the publick Security is immediately concerned; for, he is an infamous Person, and is under a temptation to conceal part of his own guilt, or to lay it wholly upon his Companion; ^e Infidels that have no notion of a God, or of the Obligation of an Oath; ^f blind Persons, when the question is in relation to the sight; ^g deaf Persons, in relation to that which is said to be spoken; these are all prohibited to be Witnesses. ^f Thus Witnesses that vary and contradict themselves ought to be rejected. ^g Indigent Persons and Beggars ought to be suspected, because they are easily corrupted. I do not mean poor Citizens or Labourers, who know how to get a livelihood; for such Poverty is often attended with great honesty.
- Other Witnesses are forbidden, by reason of the Cause to be try'd, or of the Persons concerned in the Trial.
- ^h D. 22. 5. 10. ^h Where the Witness has any present Interest or hopes of it in the success of the Cause, he is to be rejected; for Men will not be easily persuaded to speak against their own advantage, and in deposing they will be apt to discharge and exonerate themselves.
- ⁱ D. 1. 8. 6. 1. ⁱ A Member of a Community or Corporation shall not be a Witness in a Cause where the Community or Corporation is a Party, if the particular Members may have any advantage in the Victory. But if the Profit redounds to the Community in general as a Community, a Member of the Body may be admitted to be a Witness.

So by the Canon Law c. insuper, & c. cum nuntius X. de Testibus. See the English Statute 3 & 4 W. & M. c. 11. § 12.

- A Witness may be set aside also in respect of the Persons concerned in the Trial; ^k as when the Witness is Husband or Wife to one Party, Father or Son, Brother or Sister, or near of Kin, or Domestick and Dependant. But from hence except Matrimonial Causes amongst the Kindred or Domesticks themselves; ^l for a presumed Parity of Affection takes off all suspicion of Partiality. ^m The same Exception lies against an intimate Friend, or mortal Enemy, against a Freeman that would testify against his Patron, against an Advocate or Proctor for his Client; for Advocates and Proctors may be biased by an affectation of Fame, and a desire of Conquest. If the Adversary will produce the Advocate or Proctor in a Civil Cause against their own Client, they ought to answer what they know of their own Knowledge, not what was revealed to them by their Clients; for a greater Regard ought to be had for Truth and publick Good than to private Advantages.

These Witnesses ought not regularly to be admitted to testify; yet sometimes upon extraordinary occasions they may be admitted when
Truth

^h Nullus idoneus Testis in Re sua intelligitur. D. 22. 5. 10.

^k Idonei non videntur esse Testes quibus imperari potest ut Testes fient. D. 22. 5. 6.

^m Amicos appellare debemus non levi notitia conjunctos. D. 50. 16. 223. 1.

Truth cannot be discover'd in any other manner. So in England and Holland, and several other Countries and Nations, the Testimony of most Witnesses may be receiv'd, saving a Liberty of making Exceptions to the adverse Party, and of leaving the consideration of their Credit or Interest to the Judge, Groenw. de Legibus Abrog. in D. 22. 5. But in England a Wife cannot be produced either for or against her Husband, for it might be a Cause of perpetual Discord. 1 Inst. 6. b. In France the Depositions of the Kindred of either Party are rejected as far as the Children of Cousin Germans inclusively in Civil Affairs, whether they make for or against the Party that produced them. Ordonnance 1667. Tit. 22. Art. 11. Les Loix Civiles, &c. Tom. 2. Lib. 3. Tit. 6. § 3. Art. 8.

2. The ⁿ Number of Witnesses ought to be *two* at the least to ⁿ D. 22. 5. 12 make a full Proof. And these must be free from all Exceptions, either as to their Persons or their Depositions. ^o For the Testimony ^o C. 4. 20. 9. 1. of a single Witness is of no Validity, though the Person is of a great Character; ^p unless he swears of his own Fact, and where there are ^p D. 21. 1. 58. 2. other Circumstances to concur or corroborate, or unless he is ^q a ^q Nov. 44. publick Officer; as a Notary, &c. deposing by virtue of his Office. ^{Nov. 47.} This Number

[In Imitation of the Divine Law, Deut. xvii. 6. & cap. xix. 15.]

is founded upon very good reason. For one Witness may mistake or lie, and be corrupted, and yet be consistent with himself, and so remain undiscovered; whereas two or three Witnesses may more easily be found in a Conspiracy by a prudent Judge, if they are separately examined; and though many Criminals would escape, and many might lose their Right for want of two Witnesses, yet it would be a lesser Evil than to trust so much Power to the Mistakes or Malice of one Person.

By the Common Law of England, when a Trial is by Witnesses, proof ought to be by two or three Witnesses, as to prove a Summons of the Tenant, &c. But when the Trial is by Jury, they may give their Verdict upon any Evidence. 1 Instit. 6. b. except in Treason, where two Witnesses are also requisite. 7 W. 3. cap. 3. But in many Cases by Statute-Law one Witness is sufficient.

A ^r multitude of Witnesses ought not to be examin'd to the same ^r D. 22. 5. 1. matter, but the Judge at his discretion may stop an useless repetition.

3. In order to the production and examination of Witnesses, ^s they ^s D. 22. 5. 3. must be *cited*, and forced to speak what they know of the Fact, ^{ei} 6. either in Civil or ^t Criminal Matters. And this is a Duty which eve- ^t C. 4. 20. ry one owes to the Publick for the support of Government; tho' be- ^{16.} fore the ^u Constitution of *Justinian*, Witnesses could not be forced ^u D. 22. 5. 4. to testify against Persons that were nearly related to them. ^{& 5.} C. 4. 20. 16.

K k k k

Otherwise

ⁿ Pluralis Elocutio Duorum numero contenta est. D. 22. 5. 12.

Otherwise by the Canon Law. c. fin. § Liberti. 4. qu. 2.

Upon the Summons they ought to appear before the Judge; who with Gravity and Deliberation must administer to them a solemn Oath, unless they are ^wBishops, who may depose without Oath. ^xIt will not be sufficient to send Depositions in Writing, for the adverse Party ought to have the liberty of a cross Examination.

^w C. 4. 20. 9.
^x C. 1. 3. 7.
Auth fed Index.
^y D. 22. 4. 3.
3.

In France Bishops depose in Courts of Justice, laying their Hands upon their Breasts, not upon the Evangelists. Rebuffus in proœm. Constit. Gloss. 5. Num. 27.

In England Peers are sworn as Witnesses; but when they are Defendants, or Try a Peer, they answer upon their Honour. The Quakers are allow'd to depose in Civil Causes upon a solemn Affirmation in the presence of God. 7 & 8 W. 3. cap. 34. 1 Georg. ch. But in several parts of Germany the Nobles send their Depositions in Writing under their Seals without Oath. Gail. Lib. 1. Observ. 101. Num. 13.

^z When the Witness deposes, let the Judge take notice, whether with an air of Sincerity he gives his Evidence, or with Exactness and Judgment. ^a Yet the Witness ought not to answer Questions to accuse himself of any Crime. And if he is old or weak, &c the Judge ought not to go to him, or ^b delegate his Power to another to transmit his Deposition. ^c But in Criminal Causes the Witnesses ought by all means to appear personally before the Judge and in Court.

^z D. 22. 5. 2.
& 3.
^a D. 49. 14.
3. 11.
^b C. 4. 20. 16.
C. 4. 21. 18.
D. 2. 1. 16.
^c Nov. 90.
c. 5.

The contrary is practised in many Nations, Groenw. de Legibus Abrog. in C. 4. 20.

By the Statute Law of England, if a Witness refuses to appear upon Subpoena, or process out of a Court of Record, he shall forfeit to the Party grieved ten Pounds and Damages, 5 Eliz. cap. 9.

In France the Witness not attending on Summons is fineable, and his Goods may be seized, and his Person imprison'd. Ordonnance 1667. Tit. 2. Art. 8. Les Loix Civiles, &c. Tom. 2. Lib. 3. Tit. 6. § 3. Art. 17.

In Germany, if a Witness is refractory after a pecuniary Mulct, he may be put under the Ban of the Empire for his Contumacy. Gail. Lib. 1. Observ. 100. Num. 11. & 12.

The Canon Law proceeds to Excommunication against the Witness for not appearing.

^d When the Witnesses appear the Judge ought to take care that the Person (at whose request they were summon'd) should allow them reasonable Charges for their Journey, according to their Characters. ^e And then after the Suit is contested they may be sworn and examined, but not before Suit contested, unless in an extraordinary case *ad perpetuam rei memoriam*, where there is danger in delay.

^d C. 4. 20. 11.
& 16.
^e L. 97.

In France the examination of Witnesses à futur, or in perpetuam rei memoriam is forbidden, as inconvenient and unnecessary. Ordonnance 1667. Tit. 13. Loix Civiles, &c.

After

^f After the *examination* of the Witnesses, the adverse Party may consider what Objections he hath to the *Persons* of the Witnesses, or to their *Depositions*; whether they depose upon the matter alledged; whether the Depositions are obscure or uncertain; or without assigning a Cause or sufficient Reason of their Knowledge, when a Reason is demanded of them; whether a Witness contradicts himself or any other of his Fellow-witnesses; whether the Depositions cannot be reconciled in the general; whether any Witnesses agree in a premeditated Story, and depose in the same Words, &c. These things being discussed, the Judge ought to consider the proofs on both sides, and have a greater regard to Witnesses that depose they *saw* a thing, rather than to those who depose that they *heard* it. A conclusion from the sense of hearing is not so certain as that from sight. More credit is to be given to many Witnesses than to a few, and to those that affirm rather than to those that deny; ^g to those of Quality before mean Persons, and to ^h Men before Women.

ⁱ The Depositions being once *published*, and the Witnesses approved, the Depositions may be made use of afterwards in any other Cause between the same Parties.

In England the examination of Witnesses is viva voce, in the Courts govern'd by the Common Law in Causes Civil and Criminal, and the Trial is by a Jury of Twelve Men. In our Chancery and Ecclesiastical Courts, the Depositions are taken in Writing by a Register, almost according to the Method of the Civil Law. In Criminal Causes which are Capital, the Witnesses for the Defendant do not depose upon Oath; unless in High Treason, whereby any corruption of Blood may be made and Misprision of Treason. 7 W. 3. c. 13. Witnesses also now for Prisoners upon Trials for Felony are to be sworn. 1 Annæ c. 9.

4. An *Instrument* is a Writing made use of either to register, or publish the Rules and Laws of superiors, or to preserve the memory of the Acts of private Persons. Publick Acts, written Testaments, and Contracts are thus transmitted; ^k and these are taken for proof against the Parties subscribing till the contrary does appear; for here each Person is a Witness against himself.

Property would be very uncertain if Instruments were not made use of. Now an Instrument does so settle the Affairs of Mankind, that the Parties shall not produce Witnesses to ^l contradict the contents of that Instrument; ^m unless there was fraud or force in the drawing or signing it. When there is no objection against the Instrument, the *depositive* Words, or Words directly affirming are to be believed as true, but not the *Narrative* or *Enuntiative* Words, *i. e.* those Words which affirm indirectly and *obiter*. For example, if I affirm that *Titius, who is the Kinsman of Sempronius, owes me 100 l.* These Words *Titius owes me 100 l.* is the substance of what I affirm directly, and are the *disposing* Words; but these Words *who is the Kinsman of Sempronius* are narrative and enuntiative, spoken by the by, and it may not be to the purpose, whether that is true or false, ⁿ If the Instrument runs by way of recital, *That* to which it refers ought to be produced. ^o If two Persons produce two Instruments of the same date, the one contrary to the other, each is destroy'd, because

^p D. 50. 17. because of the uncertainty; ^p unless one of the Instruments is more to be favoured in Law than the other, as when it makes for the Dow-
^{85.} er of a Woman, &c.

For the true understanding of Instruments, The *subject-matter*, the *consequences* of an Exposition, the *relation* and connexion of the Sentences, the force and *order* of the Words ought to be diligently weigh'd and consider'd, and whether the Clauses are *favourable* or *odious*, *prohibitory*, *pænal*, &c. These Considerations are necessary to find out the meaning of Laws, Contracts, Testaments, and Judicial Acts.

Thus of Instruments in *general*. They are either *Publick* or *Private*.

^q C. 7. 52. 6. 1. ^q *Publick* Instruments are solemn Writings made and confirmed by publick Authority. Such are the Instruments made by Registers and Notaries, with description of the Day, Month, Year and place where they were made, with the names of the Witnesses present at the making. These instruments prove themselves; ^r and if they were drawn up by one that was not a publick Officer, yet if he was generally esteemed to be such, the Instrument may be valid by an equitable Construction; ^s but not if it was drawn up by a pretended Officer at that time who had not such a general Character.

^r D. 1. 14. 3.
^r D. 14. 6. 3.

^s C. 12. 5. 7.

In some of our Courts in England the Acts are call'd Records, which are Inrolments in Parchment, and of so high a nature that they prove themselves; whereas the Acts of inferiour Courts may be denied, and tried by a Jury. 1 Instit. 117. b. 260. a.

2. *Private* Instruments are those which are made by private Persons, and they are either (1.) ^t *Cautio*, a Note or Bill for so much Money receiv'd. (2.) Or *Apocha*, a Note by way of an Acquittance, where the Creditor upon Receipt confesses that he hath been paid his Debt. ^u This differs from the Obligation *by Writing* before described (call'd *Acceptilatio*) because there the Creditor confesses to have receiv'd what is not receiv'd. (3.) Or ^w *Antipocha*, where a Tenant, &c. signs an Instrument or the counterpart of it, signifying that he paid the Proprietor so much Money by way of Rent, whereby the Proprietor proves and secures his Title against him. (4.) Or *Syngrapha*, an Instrument signed by all the Parties concern'd. (5.) Or *Letters*, which may be *Commendatory* or *Testimonial*, or *Credential*, which oblige those that send Embassadors; or they may be *Love-Letters*, upon which one ought not always to lay any great stress.

^x C. 4. 20. 1. ^x These are not Evidence for the Writer and Subscriber, but
^r D. 22. 3. 25. Proofs against him.

^{4.} *Books of Accompt* being private Instruments, are an half proof amongst Merchants and Tradesmen, provided the Day of Contracting and the nature of the Debt is expressed by the Merchant himself or his Agent. And this seems reasonable, because Merchants and Tradesmen are often under a necessity of dealing upon trust without Note or Writing; so that if their Books were not allow'd in Evidence, they would lie under great discouragements. ^y Wherefore the *Sup-*

^y C. 4. 19.
^{5.} & 6. 7.

pletory

pletory Oath of the Merchant with his Book of Accompt is esteem-
ed to be full proof against his Chapman.

This is the general Custom beyond Sea. Gail. Lib. 2. Obser. 20 & 23. But in England none keeping a Shop-book shall give it in Evidence for Wares or Work deliver'd, or done above a Year before the Action brought, unless the Action is between Merchant and Merchant, Tradesman and Tradesman, Merchant and Tradesman, concerning something falling within the compass of their mutual Trades and Merchandize. 7 Jac. 1. cap. 12.

The Accounts of Guardians, or any ^a private Memorandum will ^c C. 4. 19. 5. scarce be allow'd to be any proof.

If the Witnesses to an Instrument are all dead, there may be a ^a comparison of Hands by proper Persons sworn for that purpose, to ^c C. 4. 21. 20. examine other Writings of the same Person with that Instrument; or if the Instrument itself is lost by some accident, the Party must make Oath of the ^b truth of that Fact before he can be admitted to ^b C. 4. 21. 1. prove the Contents of it, for the Instrument was not the Contract [&] 5. but the proof of it.

It is question'd, That if an Instrument is found cancelled, whether it is a proof that the Debt is paid! We ought to distinguish whether it is found cancelled in the custody of the Debtor, or of a third Person. If in the custody of the Debtor, ^c upon a Plea of pay- ^c D. 22. 3. 24. ment the cancelled Instrument does prove it. But if it is found cancelled in the custody of a third Person, it may seem to have been deposited there for safe custody, and to have been cancelled by design or mistake.

All Instruments, whether publick or private may be either *Originals* or *Copies*. ^a A publick original Instrument proves it self; ^c ^a ^d D. 22. 4. 2. private Instrument must be proved by Witnesses, unless it is very ancient. ^f A Copy of a publick original Instrument may be offer'd in ^f D. 26. 8. 57. Evidence, but not a Copy of a Copy; for that would create uncertainty and perpetual confusion.

Vide the meaning of the Word Deed in the English Laws. Ante, Lib. 3. cap. 4 in fin.

V. *An Oath*, the last kind of proof, is an Act of Religion, where he that swears calls God to witness the Truth of what he affirms or denies. ^g A security which the Law hath invented to promote ^g D. 12. 2. 1. Truth and Justice. ^h It is demanded of publick Officers, of Witnes- ^h C. 3. 1. 14. ses in Courts of Justice, and of the ⁱ Parties to a Suit. A Security ⁱ C. 4. 1. 1. that carries expedition with it, and which every Man can give.

Such Oaths ought to be imposed on *Heathens* and *Jews*, which they allow to be Obligatory.

In the Empire there is a certain form of an Oath prescribed for the Jews. They swear by the Law of Moses, laying the two fore Fingers of the right Hand on the ninth Commandment. Ord. Com. Part. 1. Tit. 86.

In England the Quakers are allow'd to depose in Civil Causes upon a solemn Affirmation in the presence of God. 7, 8 W. 3. cap. . . . v. ante pag. 310.

^k C. 3. 1. 14. 1.
C. 2. 28. 1.

^k Oaths ought to be given corporally (*i. e.*) by laying the Hand upon the Holy Evangelists; and they ought to be administered to none but those who understand the nature of an Oath; for those who have not such a sufficient understanding cannot be obliged by them. But when I speak of proof by Oath, I mean only those Judicial Oaths which are given to the Parties in suit to supply the defect of Instruments and Witnesses. Such are

^l C. 4. 1. 3.

^m D. 12. 2. 31.

1. The Necessary or *Suppletory* Oath, which is given by the Judge to the Plaintiff or Defendant upon half proof already made. This being join'd to the half proof *supplies*, and gives sufficient Power to the Judge to condemn or absolve. ¹ It is call'd the Necessary Oath, because the Judge is obliged to give it at the request of either Party, tho' his Adversary will not consent to it. ^m But when the Judge does administer it he ought first to be satisfied that there is an half proof made already by one unexceptionable Witness, or by some other sort of proof. If the cause is of an high nature, and there is a temptation to Perjury, or if it is a Criminal Cause, or if more Witnesses might be produced to the same Fact, then this Oath cannot take place.

ⁿ D. 12. 2. 38.

2. ⁿ The Voluntary or *Decisive* Oath is given by one Party to the other, when one of the Litigants not being able to prove his Charge offers to stand and fall by the Oath of his Adversary; which the Adversary was bound to accept, or to make the same proposal back again, otherwise the whole should be taken as confessed by him.

In England Wager of Law is something like it.

^o C. 4. 1. 12.

3. The Oath of *Truth*, when the Plaintiff or Defendant is sworn upon the Libel or Allegation, to make a true answer of his *Knowledge*, as to his own Fact, and of his *belief* to the Fact of others. This differs from the former, for it is not *decisive*, and the Plaintiff or Defendant may proceed to other proofs, or prove the contrary to what is sworn. An Oath of Truth also is administered to Witnesses.

^p C. 2. 59. 2.

4. The Oath of ^p *Calumny*, when the Plaintiff or Defendant, or their Advocates or Proctors swear they believe that they have a just Cause, and that they will not make use of any fraudulent methods for the obtaining of it.

This Oath is abolished in some Countries, as a great occasion of Perjury. Vide antea Lib. 4. cap. 1. pag. 297.

^q D. 12. 3.
2 & 3.

5. The Oath *in a Litem*, by which the Plaintiff estimates the Damages in the loss of any thing; and which the Judge may allow or moderate.

^r C. 3. 1.
auth. post juf-
jurandum.

6. The Oath of ^d *Expences and Costs*, where the Litigant (which gain'd the Sentence or Decree) upon the taxing the Costs, affirms upon his Oath that those Charges were necessarily expended by him in the prosecution of his Suit.

These

These Oaths are unknown in the Common Law of England, but some of them are made use of in our Chancery, and all of them are used in the Courts govern'd by the Civil or Canon Law, v. Of the Oath of Purgation, ch. 4.

C H A P. III.

Of the Form and Manner of proceeding in Civil Causes, and therein of the Action, Citation, Libel, Litis Contestatio, &c.

HAVING given a description of Judicature, with respect to the Persons of whom it is to be composed, and the nature of Proofs by which a Cause must be supported, I shall give a short Scheme of the Order of Trial, and shew the general method and form of the proceedings in Civil and Criminal Causes.

In a Civil Cause there are Substantial and Accidental parts of it. The Substantial parts are the *Action*, *Citation*, *Libel*, the *Litis Contestatio*, the *Answer* of the Defendant, the *Proofs*, the *Conclusion* of the Cause, the *Sentence*, the *Appeal*, and *Execution* of the Sentence.

I. * An *Action* is a Right and Power, of prosecuting in Judicature for what is one's Due. But again, The Action. I. 4. 6. pr.

The * *Action* is a description of the Cause in Controversy by the Plaintiff before the Judge to Ground a Citation, and other necessary Process against the Defendant. So that the *Right* of Action and the *Form* of the Action are different. D. 2. 13. 1. C. 2. 1. 3.

Anciently the name of each Action proper for each Cause was to be expressed, but this nicety hath been taken away by the Canon Law. c. 6. X. de Judiciis, and the Custom of other Nations concurring with the Canon, such strictness is not observ'd of necessity at this day. Groenw. de Legibus Abrog. in Instit. 4. Tit. 6. § 1. It is not sufficient to specify the demand in Words which may be reduced to any sort of Action.

* Actions in the first signification are either *real* (often call'd *Vindications*) or *personal*, which may be call'd *Conditions*. Some are *real*, *penal*, or *mix'd*, where there is Damage given, and a Fine also imposed. They are likewise *Civil* or *Criminal*. * Some are *petitory*, which claim the property. Others *possessory*, which seek the possession only. * Some *bonæ fidei*, when the Judge has power to proceed according to Equity, as in Contracts upon good and valuable Consideration. Some *stricti juris*, where the Judge cannot depart from the strict terms of the Contract, as in mere Gifts, &c. I. 4. 6. 15. cum seqq. D. 6. 1. 24. I. 4. 6. 30.

Several

* *Actio est Jus persequendi in Judicio quod sibi debetur.* I. 4. 6. pr.

^y D. 44. 2. 6. ^y Several Actions may not be laid in one Libel.

D. 50. 17.

43. 1.

This is allow'd by the Canon Law and Modern Practice. Cap. Pastor, &c. cum delictus X. de caus. poss. & propr.

^z C. 4. 39. 9. There may be a ^z Cession of Actions, i. e. a right of Action may be assign'd over to another. He to whom it is assign'd is call'd the Cessionary or ^a Procurator in rem suam. But then this Assignment shall not be made to Persons more ^b powerful than the Assignor; for by this means the Defendant might be in a worse condition than he was at first. Neither can part of the thing in Controversy be assign'd over to ^c Advocates or Proctors, &c. Even an Action of Injury may be assigned, and the Cessionary may prosecute it in his own Name.

^a D. 3. 3. 25.

^b C. 2. 14.

1 & 2.

^c C. 2. 6. 5.

By the Common Law of England, for the avoiding of maintenance, suppression of Right, and stirring up of Suits, nothing in Action-Entry or Re-entry can be granted over. Vide 32 H. 8. cap. 34. 1. Instit. 214. a. 215. a. Tet a Sheriff's Bond by 4 & 5 Ann. c. 16. and by 3 & 4 Ann. c. 9. Bills or promissory Notes are assignable over as Inland Bills of Exchange, &c.

^d I. 4. 15, &c.

^d Interdicts are extraordinary Actions concerning possession, or a quasi possession, i. e. a possession of an incorporeal thing.

[Anciently there were certain forms of Interdicts, but they are out of use at this day. Groenw. de Legibus Abrog. in Cod. 8. 1.]

They are called *Interdicts*, because the *Prætor* interposes a sort of an *Interlocutory* Decree between the Litigants concerning the possession, till the Property can be tried.

They either *prohibit* from doing any act to prejudice the Possession of another in his Goods or Estate by forcible entries, or by erecting any thing on Banks or Rivers which hinders the Navigation, &c. Or *restore* a thing taken away by force, as a Legacy taken away without the assent of the Heir; Or they do *exhibit*; as when the *Prætor* commands one to bring in a Testament, or a Freeman detained by him, &c.

There are also *Interdicts* to gain a Possession, to retain and defend it, and to recover it when it has been lost.

By the Canon Law an Interdict is an Ecclesiastical Censure, by which Persons or Places are prohibited Divine Service or Burial till they obey the Commands of the Church c. si sententiam, 16, &c. De sentent. Excom. in 6.

The Citation.

II. After the Action is enter'd a *Citation* issueth forth, which is due by the Law of Natural Reason, tho' the form is prescribed by positive Law. ^c A *Citation* is a Monition to the Adversary to appear before a Judge to try a Cause in Controversy. By the Law of the *twelve* Tables the Summons was by private authority, and by private force; but since Defendants are summon'd by Apparitors.

^c D. 2. 4. 1.

Citation

Citation is either *verbal* by word of Mouth, or *literal* by form in Writing, or by Edict fixed in some publick place, or *real* by Arrest of the Person of the Defendant, or of his Goods; which are taken into custody by the proper Officer.

In the Canon Law the Citation by Edict is vulgarly called a Viis & modis. v. Clem. 1. De Judiciis.

A Citation may be by a Law, as when a Law is made appointing any one to surrender himself within a certain time. Clem. 2. de poen. c. 1. & 2. quam sit. 6. verſ. capientes de elect. in 6. c. quamvis de offic. ordin. c. 1. de appel. in 6.

^f An Arrest ought not to be in Civil Causes, unless the Defendant ^{f C. 7. 43. 8.} is suspected of flight, or unless he stands in Contumacy after a verbal or literal Citation. ^g Parents, Patrons, &c. ought not to be ^{g D. 2. 4. 2. & 4.} cited (without especial leave) by their Children, Freemen, &c. nor Magistrates, nor a Judge on the Bench, nor one going to be married, or to a Funeral; nor a Priest, while he officiates at Divine Service, nor one necessarily attending a Court of Justice, &c.

So it is by the Canon Law, c. 58. Episcopus qui mancipium 12. qu. 2. But this is not strictly observ'd at this Day. Groenw. de LL. Abrog. in D. 2. 4. 2. & 4. In England the Peers of the Realm are forced to appear in Common Law Courts by a distress upon their Goods, &c. And others may be arrested if the Debt or Damage is laid in the Writ above the Sum of ten Pounds, and may be forced to put in Surety or special Bail. If it is under ten Pounds they may be arrested; but an Order to an Attorney to appear for them, is sufficient for a present release.

^h If one may be cited at his own House, he cannot be arrested ^{h D. 2. 4. 21. D. 50. 17. 103.} and forced from thence in any Civil Cause; though he may be dragged thence in ⁱ Criminal Cases. ^k That is to be called his own ^{i Nov. 134. c. 5. k L. 4. 4. 8.} House where one inhabits, though he hires it, or lives there *gratis*, or as a Guest.

Quære, If this Privilege may extend to a Miller in his Mill, or a Mariner in his Ship, v. Peckium de rure sistendi.

A ^l Citation is either *Simple* or *Peremptory*. *Simple*, which ^{l C. 7. 43. 8. D. 5. 1. 71. & 72.} issues forth without threatening a denial of the allowance of farther time. *Peremptory*, in which as much time is allowed as is usual in three simple Citations, adding the Word *Peremptorily*, and threats of Punishment upon Disobedience.

According to the Canon Law it may be General, against all Persons that pretend any Interest in the Cause, or Special against any one particular Person.

If the Citation is in Writing, it must contain the Name of the
M m m m Judge

^h *Nemo de Domo sua extrahi debet.* D. 50. 17. 103.

ⁿ Nov. 53.
^o 3.

Judge, the Name of the Defendant who is cited, and the Name of the *Plaintiff* at whose Instance the Citation goes forth, with the *Cause* of Action, the *Place* of Judicature, and the fixed *Time* for appearance. ^m The Time in Law is twenty Days.

In Practice according to the distance of the Place.

ⁿ C. 3. 12. t. t.
Of the Libel.
^o C. 3. 9.
Auth. offeratur.
D. 2. 13. 1.

The Name of the Judge ought to be inserted in the Citation that it may be enquired whether it issues out by a *competent* Judge; and if so, whether by his Command; and whether the Judge is an Ordinary or Delegate. The Name of the *Defendant* is necessary that it may appear he is the Person concerned. So of the *Plaintiff*, that the Defendant may know whether he shall yield or contend. Thus he ought to be informed of the *Cause* of Action, that he may consult his Counsel; of the *Place*, that he may be satisfied whether it is safe for him to appear there, or whether the Judge has Jurisdiction; of the ⁿ *Time*, whether it is not on a *Holiday*, or in the time of Harvest, &c. when Courts ought not to be kept.

III. ^o When the Defendant appears upon the Citation, the *Libel* ought to be exhibited by the Plaintiff, and a Copy of it deliver'd to the Defendant. A *Libel* is a Writing containing the complaint of the Plaintiff. It contains the Plaintiff's Case, a Complaint of Injustice, and a Petition for Relief. The Libel ought to be *apt* and *concludent* *distinct*, *certain* and *special*, not *contradictory* to it self, or *conditional* or *alternative*. It may be composed by way of Articles or Positions, or without Articles in a continued Relation.

In our Common Law the Complaint of the Plaintiff is call'd the Declaration; but in Courts of Equity the Bill. In Criminal Cases the Accusation is called either an Indictment or an Information. But by the Laws of England, &c. in Criminal Cases (that are Capital) no Defendant can have a Copy of his Indictment, unless in High-Treason or Misprision of Treason, &c. 7 W. 3. c. 3.

Of the *Litis*
Contestatio.
^p C. 3. 9. 1.
& seqq.

IV. ^p *Litis Contestatio*, or the Contestation of the Suit is the foundation and beginning of the Cause; for the Entry of the Action, the Citation and the Libel are only preparatory to it. The *Litis Contestatio* is the answer and denial of the Defendant to the Plaintiff's Libel. If it is omitted, *regularly* the proceedings are null and void. But when the Answer is made, the Plaintiff may gain many Advantages by it.

In our Common Law it is called Joining Issue.

Of the Answer
of the Defen-
dant upon
Oath.
^q D. 11. 1. 1.
& 21.

V. Then follows the *Answer* of the Defendant upon Oath to the Positions or Libel of the Plaintiff. The Defendant did heretofore answer to Interrogatories to ground an Action upon a Discovery; but

^p Non solet deterior conditio fieri eorum qui litem contestati sunt quam si non; sed plerumq; melior. D. 50. 17. 86.

Pœnalia Judicia semel accepta in Hæredes transmitti possunt. D. 50. 17. 164.

Omnes Actiones quæ morte aut tempore pereunt, semel inclusæ Judicio salvæ permanent. D. 50. 17. 139.

but this hath been long out of use. With this answer the Defendant may give in his *Allegation* to the Plaintiff's Libel.

VI. After this both Parties prepare to produce their *Proofs*. These are to be produced (within a certain time limited by the Judge) both by the Plaintiff and Defendant. And each Party may cross-examine any Witnesses by giving *Interrogatories* into the Court for that purpose. And then *Examination* and *Publication* of the Depositions being made on both sides, and Copies deliver'd to the Parties, there is afterwards

VII. A *Conclusion* of the Cause, or a renouncing all farther time to make any more proof by a submission of the Controversy to the decision of the Judge upon hearing the Advocates on the Law and Fact.

VIII. The *Sentence* or Decree of the Judge, is the Determination of the Controversy between the Litigants, either by condemning or absolving. And this is the end of the Suit as the *Litis Contestatio* was the beginning of it.

In France a Sentence is call'd an Arrest.

A Sentence is either *Interlocutory* or *Definitive*. *Interlocutory* where the Judge decides some incident question arising upon the principal Cause. This may be revoked by the same Judge at any time before the definitive Sentence, tho' no Appeal is interposed against it. *Definitive*, by which the principal Cause it self is determin'd, which cannot be revoked by the same Judge.

It must be given in the presence of the Parties, or in the absence of either upon Contumacy in not appearing; and it ought to be pursuant to Law, conformable to the Libel (or else it is null and void) and according to the acts of the Court and Proofs.

The Judge need not express the reasons of his Opinion in the Sentence, because it will Subject him to the disputing humour of other Men; though this has been customary in Criminal Causes.

The Sentence ought to contain a condemnation of costs of Suit, besides the decision of the principal Point. For regularly the conquer'd Litigant ought to pay *Expences* to the Conqueror, unless he had a probable and just Cause of contending.

In the Courts of our Common Law, there is no saving of Costs upon any account, except the Action was given by Statute and no Costs mention'd.

The Sentence passes into a compleat Judgement, and is taken for Truth (tho' erroneous) between the Parties if there is no Appeal lodg'd against it within ten Days; but it is not binding to those that were not Parties, unless the Claim is made under their Title.

In

¹ Nemo potest suam Sententiam mutare. D. 48. 19. 27.

² Victus Victori in Expensis condemnandus. C. 3. 1. 13. 6.

³ Res Judicata pro veritate accipitur. D. 50. 17. 207.

Qui Authore Judice comparavit, bonæ fidei possessor est. D. 50. 17. 137.

In England by the Statute Law Appeals may be made within fifteen Days after Sentence. 24 H. 8. 12.

^a Nov. 143.

^a A Sentence also may be by *Law* as well as by the Judge. As when a *Law* enacts that He that commits such a Crime shall suffer such a particular Punishment. If it is inflicted by the *Law Ipso facto* the Punishment bears equal date with the Crime. ^b But generally the Judge by his *Declaratory* Sentence ought even then to pronounce it to be so, before any Advantage can be taken of it, or any Incapacity be consequent upon the Punishment.

^b D. 48. 19.

12.

C. 5. 5. 3.

It is so by the Canon Law, c. cum secundum. de Hæret. in 6. c. Felicis. Eodem. But by the Laws of England a Declaratory Sentence is necessary. Green's Case 6. Rep.

Of Appeals.

^c D. 49. 1. pr.

C. 7. 62. 32.

IX. An ^e *Appeal* is an act whereby the Sentence of an inferiour Judge is impeach'd before a Superiour, for a Grievance inferr'd, or to be inferr'd, or for a Nullity in the Process, or for Injustice in the Sentence it self. The Appeal may be made from Judicial or Extrajudicial acts; but if it is made from Extrajudicial acts, it is more properly call'd a *Provocation*. It ought not to be refused by the superiour Judge, for the Law of nature does permit it, because it is a *Species* of defence. ^d It ought to be receiv'd in all Civil Causes, and in some ^e Criminal Causes.

^d C. 7. 62.

20.

^e C. 7. 62. 14.

& 29.

[Vide postea.]

^f C. 7. 62. 36.

D. 49. 5. 2.

^g C. 7. 62. 4.

& 7. & 11.

^h C. 7. 62. 20.

ⁱ C. 3. 13. 4.

The Appeal may be from an ^f Interlocutory Decree as well as from the Definitive Sentence. There may be an Appeal from Extrajudicial acts; as ^g Elections, Nominations to Offices, &c. ^h Neither ought the Judge from whom it is appeal'd think it an injury or an affront to him; for the whole Fact might not have been laid before him in the first instance. ⁱ But when the Appeal is made, it ought to be directed to the next superiour Judge.

Tho' by the Canon Law Appeals are immediately directed to the Pope. 2. qu. 9. c. ad Romanam.

^k C. 7. 65. 2.

^l C. 7. 62. 21.

^m C. 7. 65. 4.

ⁿ C. 7. 62.

auth. hodie.

^o C. 7. 63. 1.

^p C. 7. 70. 1.

Sometimes an Appeal ought not to be *admitted*, ^k as when a Crime is confessed; nor from a regular ^l Execution of a Sentence, ^m nor against the Collector of the publick Taxes, nor if ⁿ ten Days are elapsed after Sentence, or ^o after the knowledge of such a Sentence, nor after ^p three Sentences conform or pursuant to each other; for the Law will not intend that any one can be used unjustly by so many Judges.

There is no restraint after three Sentences in our English Laws; nor in Germany. Mynf. 2. Obser. 15.

While the Appeal is depending an *Inhibition* issues to the inferiour Judge to stay the Execution, ^q and not to innovate or *attempt* any thing till order. And then the Party appealing may ^r exhibit new matter

^q D. 49. 7. 1.

& 2.

^r C. 7. 63. 4.

matter and new proofs. ^aRegularly there ought not to be an Appeal from an Interlocutory Decree. ^cC. 3. 1. 16.

This is observed in the Imperial Chamber. Gail. 1. Obser. 129. Mynf. 2. Obser. 46. *But by the Canon Law the Appeal may be from any Grievance, tho' new matter ought not to be produced.* c. cord. de Appellat. in 6. Clement. appellanti. de Appell.

Sometimes an inferiour Judge ^aConsults his superiour before the Sentence, upon any difficulty in the Cause by *relation* or reference to Him. ^cC. 7. 61. 1. ^dD. 49. 1. 1. 2.

And this was formerly very common as the Rescripts of the Emperors in the Code directed to inferiour Judges sufficiently prove; but it was afterwards disused, tho' now revived by the Canon Law. c. 8. X. h. t. and at this day it is practised in Flanders and Germany. Groenw. de LL. Abrog. in Tit. de Relationib. C. 7. 61.

^a There can be no Appeal from the Prince, but he may be *petiti-* on'd for a review. ^dD. 49. 2. 1. 1. ^cC. 1. 14. 12.

By the Canon Law there can be no Appeal from the Pope. c. Ipsi sunt Canones. 16. c. cuncta per mundum. 17. 9. qu. 3. *Yet Quære if he is guilty of Heresy.* 40. Dist. c. 16. Si Papa.

There can be no Appeal from the Electors of the Empire, &c. under a certain Sum. Appendix 1. ad Gailii Obser. de Privilegiis de non Appellando.

An Appeal may be from a *Nullity*, where the Judge was incompetent, corrupt or refused for a good Cause, or when he had not jurisdiction, or where the Sentence was against one ^adead, ^aor against one absent and not summon'd; or by omitting the ^bsubstantial parts of the Process, or if there is a manifest ^cError in the Sentence it self, ^aor if the Sentence is against a former Sentence in force between the same Parties, ^bor if the Sentence be given upon a *Sunday*, &c. for upon those Days all Judicial acts are void. ^dD. 49. 8. 2. ^cC. 7. 45. 4. ^bC. 7. 64. 2. ^aC. 7. 64. 1. ^cC. 3. 12. 9. ^dD. 49. 8. 1. ^cC. 7. 42. ^bC. 1. 19. 5. ^aEt Auth. quæ Supplicatio.

By Custom Appeals have ceased in Criminal Causes. Gail. 1. De pace pub. 20. numb. 36.

If the superiour Judge finds there is no just Cause of Appeal, He confirms the Sentence or *Remits* it to the First Judge to put it in Execution.

^c *Supplication* is an extraordinary remedy almost of the same nature with an Appeal; for it is a Complaint within *two* Years against a Sentence, where the Person against whom the Sentence was pronounced did not appeal in time, or where an Appeal is prohibited. This Complaint may be made to the same Judge, or to the superiour to revoke the Sentence. ^cC. 7. 42. ^bC. 1. 19. 5. ^aEt Auth. quæ Supplicatio.

^d *Restitutio in integrum* is near of kin to an Appeal, and is a reducing a thing into its first state, where an Appeal has been neglected. ^aIt may be granted to Minors ^awhere they have been injur'd by the Decree of the Judge on any Judicial Act. ^bTo the Common-wealth ^cD. 4. 4. 24. ^bC. 2. 27. t. t. ^aC. 2. 54. 4. ^cC. 1. c. 2. ^dX de in in-tegr. Refit.

wealth or the Church, who are allow'd the privilege of Minors.
 § D. 4. 6. t. t. 3. § To those that are not in Minority, and who are above 25 Years
 C. 2. 54. t. t. of Age, as to all others upon any just reason of Absence, Error, Fear,
 Fraud, &c. concerning Contracts, erroneous Confession, Proof, or
 in any other Cases where they may complain of a wrong or mistake.
 This Restitution ought regularly to be asked and granted and finished
 within ^h four Years after the grievance.

^h C. 2. 53. 7. A Complaint of ⁱ Nullity in the Sentence may be brought at any
ⁱ C. 7. 39. time within thirty Years.

Vide ante, pag. 321.

Remedium Syndicatus (i. e. *cause dictionis*, of Pleading) is where
 one of the Litigants accuses a Judge, that He was corrupted or bribed
 to give the Sentence. This might be brought against the Judge,
 tho' there was no Appeal from his Sentence; and upon proof ^k He
 is obliged to satisfy the injured Party in his damage and costs.

In England Supplication, Restitutio in integrum, & Remedium
 Syndicatus are unknown. In the Courts of Common Law, the method
 to reverse a Judgement is either by Writ of Error or Writ of
 false Judgement, or by Appeal to the Quarter Sessions against an Order
 of a Justice of the Peace. In our Courts of Equity, Civil or Canon Law,
 the usual way of reversing a Sentence is by Appeal.

A Review is a Petition to the same Judge to re-hear the Cause,
 and to rectify the Sentence if he shall see any reason for it.

But this is not allow'd either by the Civil or Canon Law, being
 introduced by particular Constitutions. Gail. Lib. 1. Obs. 153. In En-
 gland this Practice is used in the Chancery or Courts of Equity.

Of Execution
 of the Sen-
 tence.

^l C. 7. 53. t. t.

^m D. 42. 1.

6. 3.

ⁿ D. 6. 1. 68.

^o D. 42. 4. 1.

C. 7. 53. 3.

^p C. 7. 53. 9.

X. ¹ Execution of the Sentence is a Judicial act, by which the Per-
 son condemned by the Sentence, is forc'd to surrender to the con-
 quering Litigant the thing adjudged by that Sentence.

This Execution may be either by an *Action* upon the ^m Judgement
 or Sentence, or by the *Office* of the Judge who gave the Sentence.

ⁿ If the Execution is upon a *real Action*, the thing sued for is either
 taken away by force and a military Execution, ^o or the Person (on
 whose behalf the Execution is made) is put into possession. ^p If the
 Execution is upon a *personal Action* for the payment of a Debt or
 Damage, it is made by Distress, or by taking Goods to the value,
 by putting the Person into possession of all the Estate to pay him-
 self.

Upon an Execution on the Goods in a Personal Action for Debt
 or Damages, this order is to be observ'd. First, the *moveable* Goods
 may be taken, ^q excepting Tools of Husbandry, Oxen of the Plow,
 the Clothes and Bedding of a Debtor, or the necessary Tools of
 Workmen, &c. if the Execution may be satisfied some other way.
^r After these, the *immoveable* Estate may be seized and the *Debts*;
 but last of all the Person of the Debtor is to be ^s imprison'd.

^t These Executions cannot be stopp'd by putting in Bail or Securi-
 ty, unless upon some extraordinary reasons, for that allowance would
 create

^q C. 8. 17.

7 & 8.

C. 8. 17.

Auth. Agricul-

tores.

^r C. 7. 53.

3 & 4.

^s C. 7. 71.

1. 8.

^t D. 42. 1.

4. 3.

create a new Action. Yet if the Execution is contrary to this method, it is valid till Complaint is made; for the Law does not say that the Act shall be null and void, tho' it directed the Officer to observe such Order. Neither hath the *Exchequer* any Obligation to observe this Order. * For the Person of the Debtor may be first^a C. 10. 19. 2. committed to custody without a previous Execution on his Goods. What if the Officer does not observe his Commission and Authority? * He may be resisted by force, * and is liable to prosecution for^b C. 12. 61. 5. Theft. * C. 6. 2. 8.

† But when the Debtor is imprisoned, if he yields up all his Estate into the Hands of his Creditors to be sold by Auction, his Body ought to be discharged from Chains, from Imprisonment, from Servitude, or from Working for the advantage of the Creditors, as was formerly practised.^c C. 7. 71. 1. & 8.

By the Law of the twelve Tables the Creditors might cut in pieces, and divide the Body of the Debtor; a Law that was intended rather to frighten Men from Prodigality than to be put in use. Gellius Lib. 20. cap. 1. But as others conjecture, the cutting and dividing his Estate was only design'd by it. Vide the English Statutes of Bankrupts. 13 Eliz. 7. 1 Jac. 15. 21 Jac. 19. 13 & 14 Car. 2. cap. 24. 4 & 5 Ann. 17. 5 Ann. 22. 5. Georg. ch.—

However, the present Laws do not give the benefit of *Cession* to Knavish or Prodigal Bankrupts, but only to those who have been ruin'd by Fire, Shipwreck, or other inevitable Misfortunes. * And if^a Nov. 135. those will swear that they are not able to pay their Creditors, they shall be suffered to Trade on without yielding up to their Creditors those Goods which are in their possession. And * if all the Goods are able^b D. 42. 3. 6. to discharge the Debts, yet the Debtor must be allow'd enough to maintain and support him. ^b This allowance ought especially to be^b D. 42. 1. 17. made between Parents and Children, Husband and Wife, ^c between^c D. 42. 1. 19. 1. the Giver and the Reciever, and ^d between Partners.^d D. 42. 1. 16.

The Oath before-mention'd is not allow'd at this day. In Germany, France, and Spain, a Cession of Goods by Debtors ought to be done solemnly, and in a Court of Justice; and at Lyons such a Debtor ought to wear a green Hat. Perez. in C. 7. Tit. 71. num. 2, & 11. Luciani Suavi Sylloge Quæstionum, &c. Cent. 4. cap. 28. Covarruv. Lib. 2. c. 1. But in France a Cession is wholly denied to Foreigners. Groenw. de Legibus Abrog. in C. 7. 71. 4. And in England allow'd to no body by any general Law; but sometimes poor Prisoners are discharged by particular Acts of Parliament. Tet vide 4 & 5 Ann. c. 17. 5 Georg. ch.—concerning Bankrupts.

* From hence we may collect that by *Cession* the Debtor is not discharged, but that the Execution only is suspended till he arrives to a more plentiful fortune. * The deceitful Debtor may be imprison'd^e C. 5. 13. 1. for he deserves that punishment for his injustice.^f D. 17. 2. 63. & 4. ^g D. 42. 1. 22. 1 & 52.

These Ten particulars are the Substantial parts of the Order in a Civil Cause, but there are Accidental parts also which may happen throughout the proceedings, as

Of Contumacy.

ⁱ *Contumacy*, & which is a disobedience to a competent Judge; and it is either *true* or *presum'd*.

^g D. 42. 1. 53.

^h D. 42. 1. 53.

ⁱ.

ⁱ D. 42. 1. 53.

².

^h *True Contumacy* is when after *three* simple Citations, or one *peremptory* Citation, a Man does willingly refuse to appear. Willingly, for an hindrance by Sicknes or necessary Business is not to be accounted a refusal or disobedience.

Presum'd Contumacy is when a notice to appear hath been left at the House of any Person, or when Notice hath been proclaim'd in some publick place, and it is uncertain whether he hath heard of it.

^k D. 5. 1. 73.

¹.

The ^k *Punishment* of Contumacy in the Plaintiff for not appearing at the proper time, is that his Citation shall be *Circumducted*, and that he shall lose his Process, and pay the Defendant's Costs. If the

^l D. 2. 7. 2. 1.

^m D. 42. 4. 7.

¹ & 2.

ⁿ D. 39. 2.

16, 17, 18,

19, 20.

Defendant is Contumacious, ^l he may be fined, or the Plaintiff may be put in ^m possession of his Estate till he hath recover'd his Debt, &c. This is done by Two Decrees. The first Order is called the

^o D. 49. 1.

23. 3.

^p C. 2. 59. 2.

⁷.

^q D. 5. 1. 30.

ⁿ *Primum Decretum*, where the possession is given for custody only to collect the Profits. The second Order is the *Secundum Decretum*, interposed after the first, where for continuation of the Contumacy the Plaintiff is made the Rightful Possessor till the Debt, &c. is paid.

Or the Defendant may be barr'd from an ^o Appeal till he submits; or he may be imprison'd; or if he will not answer after appearance, the Libel against him may be taken *pro confesso*; or he may lose the benefit of the Law, and not be ^q heard in any other Cause; or the Judge may sequester his Estate, and inhibit his Tenants from paying any Rent to him.

^r D. 11. 1. 11.

⁴.

^r In *Criminal* Causes a contumacious refusal to answer, shall be taken for a Confession of the Crime.

Tho' by Modern practice such Persons are put upon the Rack. Marantæ Spec. Aur. de. Contumaciâ, num. 29.

By the English Laws the Criminal that stands mute in Misprision of Treason and Felony, shall suffer the Punishment call'd Peine fort & dure; which see 2 Instit. 177. West. 1. cap. 12.

Appointment

of a Proctor.

^s I. 4. 10.

^s An appointment of a *Proctor* to appear for the Plaintiff or Defendant, for it is lawful for every Litigant to be heard by a Proctor if he pleases.

Vide Antea Of Proctors pag. 300.

Exceptions.

^t I. 4. 13.

D. 44. 1. 2.

^u D. 44. 1. 3.

3. An ^t *Exception* or Plea which is a bar to the Action.

^u It is either *Dilatory* or *Peremptory*.

1. *Dilatory* Exceptions bar the Actions for a time. As an Exception of a promise not to sue for a Debt till such a time; or they are made against the Judge and his Jurisdiction; or it is a refusal of him as *suspected* of Partiality; or against a Proctor that he has no Authority or Warrant to sue; or that a Guardian was never chosen to that Office; or that the Minor sues without his Guardian; or against the Libel,

^t Cui damus actiones, eidem & Exceptionem competere multo magis quis dixerit. D. 50. 17. 156. 1.

Libel, that it is obscure and inconcludent. ^w *Dilatory Exceptions* ^{C. 8. 36. 12. & 13.} are to be proposed regularly before Suit is contested or issue join'd.

In our Common Law Dilatory Exceptions are call'd Pleas in Abatement.

2. ^x *Peremptory Exceptions* are those that bear and exclude the ^{D. 44. 1. 3.} Action for ever. As a Plea of Force and Fear, of Error or Deceit, or of a Payment and a Release, a former Judgement and Recovery, &c. ^y *Peremptory Exceptions* may be pleaded at any time before ^{C. 8. 36. 8.} Sentence.

4. ^z A *Replication*, which is an Answer of the Plaintiff to the Ex- ^{Replication.} ception or Plea of the Defendant. ^{D. 44. 1. 2.} Upon this there may be Dupli- ^{1.} cation, Triplication, Quadruplication; but regularly no farther. ^{D. 44. 1. 2.}

5. ^b *Satisfation* is necessary that Sentences may have their due ef- ^{3.} fect. It is nothing else but a security or *Caution* given to each Liti- ^{Satisfation.} gant to the other, *viz.* ^{I. 4. 11. 2,} On the behalf of the Plaintiff, that he will ^{3, 4.} prosecute his Suit and pay the Costs and Expences if he is cast; and ^{C. 3. 9.} the Defendant give security that he will continue in Court till Sen- ^{auth. Libellum.} tence, and not depart without leave. This caution is either *Fide-* ^{C. 1. 3. auth.} *jussory*, which is properly call'd *Satisfation*, and ought to be given ^{Generaliter.} in all Suits; unless the Judge indulges some Persons upon special rea- sons to give caution by *Pledge*, or by *Oath*, or by bare *Promise*; es- pecially where the Person possesses a real and immoveable Estate within the Jurisdiction.

Vide antea *Of Proctors.* pag. 300.

It is usually enquired at this place whether he that is Bail in the first Action must continue Bail through all Appeals. The Doctors are very much divided upon it, and the best of them direct that the course of the Court ought to be the Rule: But according to my best enquiry I think the Satisfation (Judicio fisti) to continue in the Court, &c. and (Judicatum solvi) to pay the condemnation is almost out of use in other Nations. In its place Foreigners are to appoint an House within the jurisdiction, where they may be summon'd and cited. Groenw. de Legibus Abrog. in Instit. 11. tho' perhaps the strict observance of Satisfation according to the Civil Law may not be inconvenient in limited and narrow jurisdictions.

By the Laws of England the Plaintiff does not give any Bail for the Costs; which is an encouragement to vexatious Actions; unless it be upon a Writ of Error. 3 Jac. I cap. 8.

6. ^d *Reconvention* or *Mutua petitio*, is another Action (or cross ^{Reconvention.} Bill) brought by the Defendant against the Plaintiff before the same ^{d C. 7. 45. 14.} Judge, either by way of compensation or particular reconven- tion.

It is *Proper* and *Improper*.

Proper, where both the Causes proceed orderly by the same steps to a Sentence.

Improper, where that equality of proceedings is not observ'd. Both the Causes may be determin'd by one and the same Sen- tence

7. ^e *Intervention* is the claim of a *third* Person between the Liti- ^{Intervention.} gants for *his* Interest and Title by *Interpleading*. ^{D. 49. 1. 5.}

O o o o

8. ^f *Laudation* ^{& 14.}

Laudation.

C. 8. 45. 7

& 8.

D. 19. 1. 6. 5.

D. 45. 1.

139.

8. ^f *Laudation* is when one is sued in a real Action, and the Defendant does (*Laudare suum autorem*) *demonstrate* the Suit, and *vouch* to warranty the Person from whom he derived the Title, that he may have *recovery recompence* over against him, if the Title fails, or is evicted by reason of his departure, or going out of the Court.

Nominatio authoris, a nomination of the Person that has the Title, differs something from *Laudation*; for this has the Title in his own Name, but he that *nominates* the Proprietor claims Title under some other Person as Tenant, &c. And if the Defendant should pretend to defend the Title himself and is cast, it ought not to prejudice the Title of the true Proprietor.

Of Trans-

action.

D. 2. 15.

1 & 2.

C. 2. 4. 38.

i C. 2. 4. 16.

& 19. & 29.

k C. 2. 4. 20.

l C. 2. 4. 39.

9. ^b *Transaction* is a *Concord* or Agreement of an uncertain and doubtful Suit, both Litigants yielding up part of their pretences on each side; the case must be doubtful, and something must be given or done. If the matter is *certain* in its nature, a Transaction upon it is null and void. ¹ It is of that force that the Suit cannot afterwards be *revived* upon any pretence of finding out new Proofs or Instruments; unless it was occasion'd by deceit or force; ^k for a Transaction, and a Sentence are of equal validity. ¹ In the Contract *Do ut facias* one Party may recede; but in a Transaction he cannot.

m D. 3. 2. 5.

C. 2. 4. 18.

D. 48. 21. 1.

^m He that gives Money that his Accuser should *desist* from his prosecution in Cases that are not Capital, is esteem'd guilty; but not if the Suit is fairly agreed.

A Compro-

mise.

D. 4. 8. 1.

10. ⁿ *Compromissum*, (a promise to refer to Arbitration) often happens in the progress of a Suit; the Parties thinking it more safe to refer the matter to the determination of Friends than to venture a Trial at Law.

There is an *Arbitrator* and an *Arbiter*.

D. 17. 2. 76.

eum seqq.

P D. 50. 17.

22. 1.

An ^o *Arbitrator* is properly a Reconciler or Moderator according to Equity and Truth. ^p And if his Opinion is unjust it ought to be set right; as if in a Contract of letting to hire and hiring work, it is agreed that the work shall be according to the *discretion* of him that letteth it to hire; the Law will reduce his determination to the discretion of a just and good Man. So if a Freeman promises that he will do as much work as his Patron shall direct; the determination of the Patron shall be valid no farther than it is reasonable.

q D. 4. 8.

27. 2.

^q An *Arbiter* is referr'd to when two Persons at the least do (*Compromittere*) promise together under a penalty or without a penalty, to stand to his award or determination. The Sentence of this Person is to be obey'd whether just or unjust, ^r unless you can prove Corruption; for the choice of the Person was by your own act, if he wanted sufficient Knowledge.

r D. 4. 8. 3. 1.

It may be known whether one is appointed *Arbitrator* or *Arbiter* by the form and terms of the *Compromise* or Submission.

s D. 4. 8. 17.

6 & 7.

D. 4. 8. 27. 3.

^s It is advisable to nominate an odd number of *Arbiters*, that there may

^m *Intelligitur Confiteri Crimen, qui pasciscitur.* D. 3. 2. 5.

^p *Generaliter probandum est, ubicumq; in bonæ fidei Judiciis consertur in Arbitrium Domini vel Procuratoris ejus Conditio, pro boni viri Arbitrio hoc habendum esse.* D. 50. 17. 22. 1.

Recte Verbum pro viri boni arbitrio est. D. 50. 16. 73.

may be a *major* part to determine, if some that are present should dissent; if one is absent, the rest ought not to proceed without a special power.

By the Canon Law if one is absent and will not appear upon notice the rest may proceed. c. 2. De Arbitris in 6.

If there is but two, and they cannot agree, some affirm that the Judge may force them to chuse an *Umpire*; and if there is one or more *Arbiters* chosen, the Law will force them to make their award after they have undertaken the Office; unless it is in *Criminal Causes* ^{D. 4. 8. 32.} or upon a popular Action. ^{6, 7, 8.}

This *Compromissum* may be either *General* or *Special*, ^{D. 4. 8. 21.} with a ^{6.} *Penalty* or *without Penalty*. ^{D. 4. 11. 2.} Tho' there is no *Penalty* annexed to ^{C. 2. 56. 5.} the submission, yet an Action *in factum* will ly for the performance of it. And when there is a *Penalty*, if one of the Parties will pay it, the Controversy returns to its first State, and may be determin'd *Judicially*.

By the Canon Law these cannot be Arbiters (viz) Bondmen, Women, Excommunicate Persons, Monks without the license of the Superiour, a Lay-man in a spiritual Affair, except a Clergyman is joined with him, or except he is empower'd by Authority from the Pope, &c. v. Lancel. Inst. Lib. 3. Tit. 4. De Arbitris.

Causes concerning Benefices, Tithes, Elections, Matrimony, Liberty, Extraordinary Crimes, or any Ecclesiastical Affairs (whereby the Church may be prejudiced) cannot be referr'd to Arbiters. For these ought to be decided by the higher Courts. Vide Corv. Jus. Can. Lib. 3. Tit. De Arbitris.

This power of the Arbiter is *determin'd* if he hath not judged ^{C. 2. 56. 1.} within the Day appointed; ^{D. 4. 8. 32.} or if one of the Parties will *pay* the ^{1. 3. 5.} *Penalty* of the submission; or it may be ended by *Transaction*; or by *Destruction* and loss of the thing in Controversy; or by the Death of one of the Arbiters if there are many; or of one of the Parties in the Compromise; unless the Heirs are expressly included; ^{D. 4. 8. 27. 1.} for then the Heir may proceed in the place of the Person deceased.

In the Kingdom of Naples and Sicily, the Kindred to the fourth Degree, may be forced to accept of an Arbiter, and are prohibited to sue each other at Law. Joh. Arnono Different. 98. Vide the English Statute concerning Arbitration. 9 & 10 W. 3. c. 15.

11. There may be also *Commissions* to examine Witnesses. And Commissions.
12. A *Judicial Sequestration*. Sequestration.

See before, Of a Depositum pag. 217.

13. There may be also the several sorts of *Judiciary Oaths* above-Oaths: mention'd *pag. 313.*

These are the *Accidental* parts in a *Civil Process*, and which often happen in a *Civil Cause*, but none of them are of absolute *necess.*

necessity. I shall now run over as lightly, and in *general* the method and order in *Causés Criminal*.

C H A P. IV.

Of the Form and Manner of the Proceedings in Criminal Causes. And therein of Inquisition, Denunciation, Accusation, Imprisonment, the Oath of Purgation, the Torture or Rack, lastly of Punishments.

Criminal Causes agree in the *substantial* parts with Civil Causes. In both a *Citation, Libel, or Articles* are exhibited, *Suit contested*, Proofs receiv'd by *Confession, Presumptions, Witnesses and Instruments*; there is also a *Conclusion* in the Cause, a *Sentence, an Appeal and Execution* awarded upon it. It also admits of some of the *Accidental* parts of it, as *Contumacy, the assistance of Advocates and Proctors, Exceptions, Replication, Satisfaction, Transaction, &c.*

Criminal and Civil Causes *differ*, because Criminal and Publick Causes begin by *Inquisition, Denunciation or Accusation*, and are instituted for publick Example without any gain to the Prosecutor. But Civil and Private Causes begin by *Action*, and tend to recover a private right.

In Crimes that are Capital or not Capital, the *Process* is by *Inquisition, Denunciation, Accusation, Imprisonment, the Oath of Purgation, the Rack or Question*; and the *Execution* of the Sentence is by *Punishments*.

Of Inquisition.
b C. 9. 2. 7.
& 8.

1. ^b *Inquisition* is an Act of the Judge making enquiry by virtue either of his *Office* in general, or upon common *Fame* arising from credible Persons; or at the private *Denunciation* of his Officers or others against a particular Person.

It appears then that *Inquisition* is either *General* or *Particular*.

c D. 1. 18. 13.

1. *General*, ^c when the enquiry is made *if* such Crimes have been committed.

2. *Particular*, when the Inquisition supposes the Crime committed, but asks the question by *whom* such a Crime was committed, as upon a Murther. For if it does not appear that a Murther is committed, such enquiry is absurd. Nay, the Confession of a pretended Murther ought not to be believ'd if the Body cannot be found.

d D. 48. 10. 7.

The Inquisition ought to specify ^d Circumstances of the Crime; as the Place, Time, the Persons with, or against whom, &c. Otherwise the Inquisition is void, because an uncertain Inquisition would take a way all possibility of defence.

e C. 1. 49. 1.

^e Magistrates were order'd to continue *fifty* Days in the same Province after they had laid down their Offices, to attend and appear if any would complain against them of Male-Administration; which kept the most powerful in awe.

This Inquisition is out of use every where except in Spain; where there is something of this nature. For often Perquisidores are sent by Commission into the Provinces to enquire into the Behaviour of Magistrates

gistrates and Judges. and to transmit the Inquisition to the Superiour Council. Perez. prælect. in C. 12. 14. num. 7.

II. *Denunciation* or *Delation* is a Judicial Complaint to the Judges of a Crime committed.

Here the Informer was bound to *inscribe* his name as hereafter in ^{Denunciation} Accusations, nor must he prosecute the Suit otherwise than as a Wit-^{f C. 9. 2. 7.} ness. It may be on a puclick account, or for a private interest.

The Canon Law addeth *Denuntiation* Evangelical, Canonical and Regular. 1. It is call'd Evangelical, because it hath a foundation in the Gospel, and proceeds from Charity to a Sinner. Matth. chap. xviii. Luke xvii. where the Complaint made to the Church hath given an occasion to transfer it to the Ecclesiastical Judge, 2. Canonical, because it was introduced by the Canons; thus when one hath an interest he may complain against his Priest, or when one having no interest objects against a Marriage by reason of an impediment of Consanguinity, &c. 3. Regular, which is a *Denuntiation* made according to the Statutes of religious and regular Societies, where the proceedings are without the formality of Judicature, and without Appeal. Vide Marantæ Spec. Aureum pag. 236. num. 4. &c. Villegut Practica Canonica, &c. De Denuntiatione Regulari.

III. *Accusation* is a solemn Complaint of a Crime to a Judge, in order to publick Punishment & where the Accuser (not a Proctor) offers a Libel of *Inscription*, in which the Crime, the Person, the Place, the Time, and all other Circumstances are contain'd. This Libel the Accuser doth subscribe and oblige himself to pay Costs, and suffer the same Punishment which he design'd for the Person accused if he fails in his Proof, or is guilty of Calumny. ^{Accusation. C. 9. 2. 16. & 17. D. 48. 2. 3.}

So it is by the Canon Law. c. quisquam 2. qu. 8. &c.

And if the Person accused is thrown into Irons, the Accuser also must continue in custody until the Trial is over.

This was instituted that Men might not rashly draw others into danger of their Lives. But because experience shew'd that these strict proceedings on the part of the Accuser gave encouragement to many Villanies, these Solemnities are almost grown obsolete. Sed v. Jul. Clarum præct. Crim. 130. and the Prosecutions now are usually managed by the Advocates general, and Proctors of the Exchequer. Groenw. de Legibus Abrog. in C. 9. 1.

In England all Criminal Causes by way of Indictments are carried on in the name of the King, and no Expences or Costs are to be recovered against him. But when the Process is by Information, the Informer may be order'd to pay the Costs to the Defendant. 4 & 5 W. & M. c. 18.

Some are ^a prohibited to accuse, as Women, (because of the revengeful nature of the Sex,) Pupils, Soldiers in pay that they may not be absent from Service, Infamous Persons, Those that are bribed, Perjured Persons, Those that are indigent and poor, for there is a

P p p p

just

ⁱ D. 48. 4. 7. just fear of Corruption, a partner in the Crime, &c. ⁱ But all of them
[&] 8. are admitted to prosecute in Treason, &c. and ^k especially where
^k D. 48. 2. 11. they have an Interest.

^l C. 9. 22. 5. ^l Children are prohibited to accuse their Parents, ^m Freemen their
^m C. 9. 1. 20. Patrons, ⁿ a Brother his Brother, &c. in a Capital Crime; for such
^{21.} Prosecutions are odious and unnatural. But I must alway except the
ⁿ C. 9. 1. 13. case of Treason; for the Safety of the Commonwealth is to be pre-
[&] 18. ferr'd before the Life of a Parent or Brother.

^o D. 48. 2. 12. ^o Some are prohibited to be *accused*, as Magistrates or Embassadors
^p C. 9. 2. 6. who are absent on the Affairs of the Commonwealth; ^p neither can
any other Person that is *absent* be tried in a capital Crime.

*Tho' Custom hath introduced a contrary practice, especially through-
out Italy; Jul. Clarus. § Fin. Quest. 44. num. 3. In England that Cu-
stom does not prevail, otherwise than by Process of Outlawry.*

Neither can an Accusation be admitted against a Person deceased,
^q C. 9. 8. 6. ^q unless in Treason.

This is not practised in England.

^r D. 48. 2. 7. 2. ^r If the Criminal is once acquitted, he ought not to be tried again
^s D. 47. 1. 2. for the same Crime; and ^s if from the same Fact different Crimes do
^{1. 2.} arise, the Criminal may be tried upon every branch; as upon Rob-
bery and Murther, if one is acquitted of the Murther, he may be
tried for the Robbery. But if the Crimes are committed at the same
time, and tend directly to one and the same end, tho' they are seve-
ral Facts, it will be advisable to try the Malefactor on that part
where the greatest Punishment is inflicted, and to comprehend all
the lesser Offences under *that* Punishment.

*In England, if one is acquitted upon an Indictment in Murther,
Robbery, Rape or Mayhem, he may be prosecuted by Appeal at the
Suit of a Party concern'd in the Injury, and so tried again for the
same Crime. 1 Instit. 187 b.*

Antecatagoria (a cross Accusation) is either by way of *Exception*,
when one that is accused retorts the same Crime upon the Accuser,
or a different Crime rather for his own Defence than for a publick
Punishment. For the principal design is that the Accuser should
^t C. 9. 1. 19. be silenced as an Infamous Person. ^t If the accused Person charges a
^u C. 9. 1. 1. lesser Crime upon the Accuser, he must be stopp'd till he was clear'd
himself; ^u but if it is a Crime of a higher Nature, *that* shall be heard
first.

This sort of cross Accusation was regularly to be prohibited; for
it was generally the effect of Revenge.

^w C. 9. 40. 2. ^w If the Person accused does not appear within a Year after the
Citation, his Estate is forfeited to the Exchequer; neither can he
recover it, tho' it appears afterwards that he was innocent. The
forfeiture of his Estate is for his Contumacy, not as a Punishment
for his Crime.

*Whether a Criminal may be allow'd an Advocate and Proctor for
his*

his Defence. V. Perez. Prælect. in C. 9. 1. num. 13. & Matthæum de Criminib. Tit. 13. c. 4. & Vide ante Of Advocates and of Professors. p. 299. 300.

V. The seizing and ^x Imprisonment of Criminals follows an Inquisition, Denunciation or Acculation, if he may be found. Sometimes the Judge will order him to be seized by the Apparitors ^y even in his own House; ^z which cannot be done in Civil Cases. Imprisonment is for Custody not Punishment; for no one ought to be punished before he is heard.

^a Such a Criminal as a Murtherer, &c. may be dragged from the Emperor's Statue or a Church, if he will not come forth upon the Summons of the Clergy; for tho' there ought to be a refuge for miserable Persons under Oppression, there ought not to be a protection for Villains.

Vide the English Law against Sanctuaries before Of Casual Homicide. pag. 279.

^b If the Criminal lies in another Province, the Judge may write to the Magistrate there to seize him and send him with a Guard; ^c for it is fit he should be punished in that Province where he gave the ill Example, by committing the Crime. ^d If the Criminal defends himself with Arms, the Apparitors may lawfully kill him rather than suffer him to make his escape, ^e if they have a Warrant to seize and apprehend him.

The ^f Magistrate may enquire into the nature of the Crime, or the Dignity or Health of the Person accused, and then he may either commit the Criminal to Prison, or set a Guard over him, or let him go at large upon giving Fidejussory caution. ^g As to the Crimes, a distinction ought to be made between the greater and the less. The greater Criminals may deserve Imprisonment, the lesser Criminals may be bail'd, or be put under a Guard; or the Criminal may be kept in custody in the House of the Magistrate.

Yet St. Paul, tho' he was accused by the Jews of a very great Crime, was only under a guard of one Soldier in a hired House for two Years at Rome. Acts xxviii. v. 16 & 30.

^h Care ought to be taken that the Prisoner be not misused by a nasty Confinement, heavy Irons, or that Money be not extorted from him for pretended Kindnesses.

ⁱ If the Criminal is let out upon Bail, the Accuser may demand that he should enter into the caution *de non Offendendo*, and the Judge may force the Criminal to give that Security.

And by Custom the Judge may force any one to give that Caution or Security for the Peace. J. Clarus Lib. 5. q. 4. n. 3.

As to the Persons accused the Sex is to be consider'd. For ^k a Woman is not to be put into a common Prison, or deliver'd to a Guard of Soldiers upon any account; but either to be let abroad upon Bail, or a juratory Caution, or to be kept Prisoner in a Nunnery.

C. 9. 4. 3. nery. ¹ And heretofore *Constantine* also had taken care that Men and Women should be imprison'd in distinct and separate Apartments.

This is not observed in England, or in any other Country. Groenw. de Legibus Abrog. in. C. 9. 4. 3.

^m C. 9. 4. 6. ^m The Criminal ought to be brought upon his *Trial* with all convenient speed, and within thirty Days, unless the Crime is such that requires a longer time upon reasons urg'd by the Prisoner or the Accuser. But then it ought to be finally determin'd within ⁿ two Years, or else the Prisoner ought to be dismissed.

By the Statute Law of England, Persons committed for Treason or Felony, upon Petition in open Court, the first Week of the Term, or the Day of the Sessions, &c. to be brought to Trial (if not indicted the next Term of Sessions after such commitment) shall upon motion the last Day of such Term or Sessions be let out to Bail, unless it appear upon Oath that the King's Witnesses could not be ready that Term or Sessions. And if such Persons are not indicted and tried the second Term or Sessions after Commitment, they shall be discharged. 31 Car. 2. cap. 2.

In many of the English Statutes the Rights of Persons in Prison are saved to them, upon the same reason as to Infants, Feme Coverts, Idiots, Madmen, or to those that are beyond Sea.

The Oath of Purgation.
D. 12. 2. 31.
C. 7. 49.
Auth. novo ju-
re.

VI. Amongst the *proofs* in a Criminal Cause the ^o Oath of Purgation is peculiar to it. It is administred where the Defendant is suspected to be guilty; who (if he swears that he is innocent, and produces honest Men for his Compurgators) ought to be discharged. If he cannot bring such Compurgators to swear that they also believe him innocent, he is to be esteem'd as convicted of the Crime.

Some imagine this Oath was the invention of the Canon Law, but it is grounded on the Civil Law; and it is used in the Temporal Courts, in Flanders, and in other places. J. Clarus L. fin. quæst. 63. n. 5. & 6. *The Oaths which may be made use of in a Civil Cause, cannot be properly applied to these proceedings, except the Oath of Truth.* Vide ante Of Oaths. pag. 313.

By the Statute Law of England, it shall not be lawful for any Ecclesiastical Judge to tender any Oath, whereby any Person may be compelled to confess, or accuse or purge himself of any Criminal Matter, whereby he may be liable to censure or punishment. 13 Car. 2. cap. 12.

Of the Rack or Torture.

P C. 9. 18. 7.

VII. The *Rack* or *Question* also is sometimes applied upon an Accusation of a great Crime; for it would be absurd to use the Rack or Torture where the Crime is only finable. ^p The Rack is an Engine, on which the Criminal is laid, having his Joints and Bones distended; sometimes applying hot Plates of Iron to his Body, and gnawing his Flesh with hot Pinchers to extort a Confession. This usage was the effect of tenderness to the lives of Men, because the *Romans* would not endure that any one should die upon the Evidence of one Witness

ness; and therefore contriv'd this method, that Innocence should appear by an obstinate denial, or Guilt by a plain confession.

The Persons who may be examin'd in this manner, are either ¹ *In-^q D. 22. 5. 21.* famous Persons, tho' they are only Witnesses, or ² mean Persons of some Reputation, and then only when they are accused, or contradict ³ themselves when Witnesses, or endeavour to conceal their Evidence. ⁴ *D. 48. 18. 15. & 18. 3.*

⁵ But the Nobles or Persons of high Rank are not to be put to the Rack, unless when they are Criminals, and only in the case of ⁶ *C. 9. 41. 8. 1. & 11. & 16.* Treason, or some Crime of the highest nature. ⁷ Nor Women with ⁸ *C. 9. 8. 4. D. 48. 19.* Child; for the Infant in the Womb is not a Criminal, ⁹ nor a Child under fourteen, ¹⁰ nor old impotent Persons, nor a ¹¹ Bondman against ¹² *D. 48. 18. 10. & 15. 1.* his Master, unless upon extraordinary reasons; for every Bondman ¹³ *D. 29. 5. 3.* is reputed an Enemy to him under whose Power and Correction he ¹⁴ *C. 9. 41. 1.* is to continue.

¹⁵ Sufficient Causes of condemnation to the Rack are one Witness, ¹⁶ *D. 48. 18. 1. & 18. 2. & 22.* pregnant Circumstances and Presumptions, or extrajudicial Confession proved by two Witnesses, &c. For the Law expressly forbids the first enquiry to be made by Torture.

The Judge must not suggest a Confession, but let him put the question generally; ¹⁷ as *who were your Accomplices?* Not thus, *Is Titius a Conspirator?* ¹⁸ *D. 48. 18. 1. 21.*

Crimes of the *highest* nature are Treason, Murther, Adultery, Incest, Rape, Sacrilege, Coining, &c.

¹⁹ The Rack ought not to be apply'd and extended to loss of Life or Limb. ²⁰ If the Judge is so cruel, he may be punished with Death; ²¹ *D. 48. 18. 7. & 10. 3. & 18. 1.* or if the Criminal lives with Banishment. ²² *D. 48. 8. 1.*

The Credit which is to be given to ²³ *C. D. 48. 18. 1. 23.* Confessions on the Rack is very uncertain. But if other Arguments and Circumstances concur, such Confessions ought to be believed, if the Criminal perseveres in them ²⁴ *D. 48. 18. 16.* twenty four Hours after he is released from the Pain. ²⁵ If he recants his Confession, he may be tortur'd a second time; and if he recants the second Confession too, he may be tortur'd a third time; and then if he recants the third Confession, he ought to be absolved. So if the Criminal denies absolutely with constancy upon the third question that he is guilty, he ought to be discharged from that Instance or Accusation.

But if he is convicted by proof, it is customary in France, and almost every where beyond Sea at this day, to put the Criminal upon the Rack, that he may own the Crime, for the Reputation and Justice of the proceedings, and to take away the liberty of Appeal. However, if he resolutely denies it, he must be executed. Perez. Prælectiones in Cod. 9. Tit. 41. num. 3. & 30.

After all, it is very much debated whether the Rack or Torture is lawful (as it is now used) according to the Laws of Equity and Reason. Those that defend this Practice, urge ¹ *1st*, That tho' no one ought to be condemned without proof, yet if one is justly suspected, he ought not to be discharged. ² *2^{dly}*, It keeps wicked Men in awe. ³ *3^{dly}*, St. Paul was order'd to be scourged by the chief Captain and examin'd, and he did not complain that That sort of Punishment was unjust, but insisted only that he was a Roman. Acts xxii. 25. ⁴ *4^{thly}*, Before a Man is brought to the Rack by the Roman Law, the Offence was to be

made out with such Evidences as would take away his Life in other Countries if the Crime was Capital.

On the other Hand it is objected. 1st. That it is contrary to natural Equity that any Man should be punished before he is found guilty. 2^{dly}, That the Torture does not directly tend to discover Truth; for oftentimes Men do confess false things against themselves, that they may dye and get rid of a Miserable Life. 3^{dly}, Some by strength of Nature and Custom will endure the Rack with contempt. 4^{thly}, Some have charged innocent Persons out of revenge. 5^{thly}, The Executioner, not the Judge, often determines the degree of Torment as the Criminal can pay him. 6^{thly}, There is no proof of its lawfulness in Holy Writ. The Woman that was to drink the Waters of Jealousy was punished, if she was guilty, but not examined. Num. 5. 11. cum seqq. St. Paul had acted imprudently to dispute the reasonableness of a Law with the Captain, who was only in a Ministerial Office to execute, and who had no Power to repeal it.

There is a third Opinion which takes the middle way, and determines it only to be equitable in the case of High-Treason, for the discovery of Accomplices; and that the publick safety of Government seems to compensate for the hardship of it.

In England there were several Ordeal Laws to find out the Truth where proof was wanting, as by Fire, by Water, and by Combat; but they are abolished or disused: The Rack, Torture, or Question is unknown in our Laws. Fortescue de Laud. Leg. Angliæ. cap. 22.

Of Punishments.
c D. 7. 65. 2.

VIII. After a condemnatory Sentence there must be Execution, which is *Punishment*. * *Appeals* are omitted by the Civil Law in some criminal Cases, yet allow'd in others.

St. Paul appeal'd unto Cæsar. Acts xxv. 9. But in England, and in our Neighbouring Nations they are out of use. Gail. de Pace Pub. 20. num. 36.

f D. 50. 16.
131. 1.

f *Punishment* is a correction for a Crime committed, or an Evil which one suffers for the Evil which he hath done. If a Man is removed from an Office, or not prefer'd to it, he is not *punished*, if he could be removed or hinder'd arbitrarily whether he committed a Fault or no; for he is left in the same State and Condition as he was before. Punishment hath its original from consent, but not directly. For when Men consent to be govern'd in Society for their mutual Benefit, the magistrate has Power to make Laws, and to punish any Delinquent even with Death; tho' he never intended that his consent should turn to his own Destruction. * Yet this Power is more clearly accounted for by considering that Magistracy is of *Divine* Appointment.

Punishments are appointed for *Reformation*, *Example* and *Satisfaction*.

They are either *Capital* or *not Capital*.

I. Ca-

f *Pœna est Noxæ vindicta.* D. 50. 16. 131.

* *Dominus Membrorum suorum nemo videtur.* D. 9. 2. 13.

1. & Capital Punishment is either a Natural or a Civil Death. A ⁸ D. 50. 16. Civil Death is by loss of Freedom or by Banishment. ^{103.} But properly speaking a Natural Death is the only Capital Punishment. And therefore to take off all Ambiguity, when such Death is intended, the Sentence must be, that he suffer Capital Punishment; so that he dye. In a large signification Capital punishment is

1st. Death, which anciently was not a punishment; for then the highest Crimes were chastised only by the *Aqua & ignis Interdictio*, which did almost amount to it. But afterwards Criminals were condemn'd to be torn by ¹ wild Beasts, or to the ^k Furca, through which ¹ D. 48. 19. the Criminal's neck was thrust, and then he was whipp'd to Death; ^{11. 3.} ^k D. 48. 19. or he was condemned to the Cross, or to be sewed in a ¹ Sack alive ^{28.} and thrown into the Sea, as in the Crime of Parricide, or to be ¹ I. 4. 18. 6. thrown headlong from the Tarpeian Rock, or to be burnt alive. &c.

But the Capital Punishments at this day are Burning or Hanging, cutting off the Head, or breaking upon the Wheel, &c.

^m When any Person is to be executed, his wearing Cloaths, and the Money in his Pocket (if it does not exceed five Crowns) may be distributed amongst the Soldiers, or to some other publick Benefaction; but these ought not to be seized by the Jaylor or Executioner. ^m D. 48. 20. 6.

From hence we may guess that according to Custom the Soldiers had leave to divide our Saviour's Garments amongst themselves.

After the Execution is over, the Body of the Criminal is not to be ⁿ buried, unless by a License from the Prince; which may be given to the Kindred, or any other who will ask it. ⁿ D. 48. 24. 12.

So Joseph of Arimathæa begg'd the Body of our Saviour tho' he was not kin to him.

^o Sometimes the Prince will not grant it, but hath ordered the Body to be erected on a Gibbet to the Terror of others. ^p Sometimes he hath granted the Body to Physicians to be anatomized and dissected, &c. ^o D. 48. 19. ^{28. 15.} ^p D. 47. 10. ^{33.}

2^{dly}, *Damnatio in metallum*, which is a condemnation to dig in the Mines, or to do some other publick Work; which kind of Punishment hath been much approved.

^q There is a difference between a Condemnation in *Metalum* and ^q D. 48. 19. in *Opus Metalli*. The first loaded the Criminal with heavy Chains, ^{8. 4.} but this other with lighter.

By a ^r Novel Constitution no Man shall lose his Freedom by this Punishment, which before that time was lost. ^r Nov. 22. c. 8.

The Condemnation to the Gallies succeeded in the place of it, so that a Condemnation to the Mines is disused. J. Clarus 332. Pract. Crim.

3^{dly}, *Depor.*

^s *Appellatio Capitalis, Mortis vel Amissionis Civitatis, intelligenda est. D. 50. 16. 103.*

³ dly, ^s *Deportation*, or perpetual Banishment into an Island, which succeeded the *Interdiction* of Fire and Water. It is call'd *Deportation*, because the Criminal is as it were *carried* from the rights which he had in his native Country. ¹ For he loses the Birthright of a Citizen, his paternal Power, his Estate, his right of Succession, and all other rights which are not given by the Law of Nations.

This Punishment is not inflicted at this day, as to all its attending forfeitures. J. Clarus 332. Pract. Crim. In the Empire the Ban succeeds in the place of it; In England the Outlawry is something like it.

Where the Criminal is condemned in a *Capital Punishment*, it must be presently executed upon him. ^u C. 9. 47. 20. But the word *presently* may be taken with some latitude, and extended to *thirty Days*, or farther upon good reasons. ^w D. 1. 5. 18. [&] D. 48. 19. 3. *Women* while with Child must not be put to Death 'till the Delivery; for the Infant in the Womb is innocent; and all Corporal Punishment against a Woman with Child ought to be deferr'd, if it may be prejudicial to the Birth. See pag. 101.

^x D. 48. 20. 1. ^{*} Note that *Confiscation* of Goods and Estate is incident to all capital Punishments. This was a forfeiture of Estate to the (*Fiscus*) or Exchequer as may be gathered from the Etymology of the word. But ^y *Justinian* holding it unjust that Parents and Children should be excluded from a share of the Estate in Crimes under High-Treason, order'd that there should be no forfeiture if there were any Descendants or Ascendants in the first, second or third degree. The Wife also had her portion or share out of the Estate of the Criminal. But if the Criminal was condemned for Treason, all his Estate was forfeited to the *Fiscus* or Exchequer, except the Wife's Portion.

Vide Ante Of Treason. p. 272.

^z C. 9. 8. 5. 4. If the Criminal for fear of Punishment for Treason, does ^z alienate any part of his Patrimony, the alienation is void; for the forfeiture has relation to the time of the Treason committed: ^a But in other Crimes the alienations are good and valid, if they are made before Sentence or Condemnation.

There are many Questions belonging to this Head about the forfeiture of Feuds, Rights of Patronage, Ecclesiastical Benefices, Rights and Actions, of Goods acquired after the forfeiture or Confiscation, &c.

In England, after an Offender is attainted of Treason or Felony, and hath Judgement of Death, he forfeiteth Lands and Goods, except in the County of Kent or Gloucester upon the Death of a Felon; for then after the King had the profits of the Lands by the space of a year and a day, by Custom they shall revert to the Heirs. There is also a forfeiture of Goods only, as upon flight in Treason or Felony; in Petty Larceny, in Homicide by Chance-medley, or Se defendendo, and where a Clerk is convict. Vide Pulton de pace, &c. Tit. Forfeiture.

But in other Countries and Nations (unless there is a local Statute

to the contrary, as in some Provinces and Cities) the Descendants, Ascendants, or Collateral Kindred in infinitum are preferr'd before the Exchequer; except in the case of High Treason. Perez. in C. 9. 49. n. 22. V. before Of Treason and of Homicide. p. 271. 278.

II. Not Capital Punishments are,

1st. Relegation, a^b perpetual or temporal Banishment from Rome; ^b D. 48. 22. or some other particular place. ^c It may be without the loss of the ^{14.} rights of a Citizen, or of Estate, or of the Power to make a Will, ^c D. 48. 22. or to succeed as Heirs, &c. ^d It may be also a Banishment into an ^{3 & 4.} Island, or to a certain part of a Province, or a Confinement to a ^d D. 48. 22. Man's own House, &c. It is a much less Punishment than Depor- ^{7 & 9.} tation.

Amongst us Transportation to the West-Indies is something like it.

2^{dly}, ^e Stigmatizing or Branding with a hot Iron upon the Face ^e C. 9. 47. 17. was customary till it was forbidden by the Emperor Constantine; who ordered that the mark should be rather made in the Hands or Legs of the Criminal; thinking it undecent and odious that the Face of a Man should be industriously deformed.

By the 5 Ann. c. 6. so much as concerns the inflicting the Punishment of Burning in the Cheek is Repealed; and where any Person shall be convict of Theft or Larceny such Person shall be burnt in the Hand as formerly.

Note that the Benefit of the Clergy was heretofore for the encouragement of Learning, a Benefit obtained by Reading, so that if the Criminal could read He saved his Life. But now by this Statute Reading is not required, and therefore any Person convict of Theft or Larceny, for which he ought to have the benefit of Reading, praying the benefit of this Act shall not be required to Read, but be punished by burning of the Hand of course as a Clerk convict. See 4 Georg. ch. concerning Transportation.

3^{dly}, ^f Cutting off a Member or a Limb (as one Hand or Foot) is al- ^f Nov. 134. low'd, and it ought regularly to be the left Hand. A ^g Fugitive ^c 13. Bondman might be punished by the cutting off one of the Feet, and ^g C. 6. 1. 3. a Falsifyer by the loss of one of his Hands, that the Criminal may suffer in that part with which he committed the Crime.

As Deut. xxv. 11.

Membrum (a Limb) is that part with which the whole Body is moved; wherefore the Finger, the Nose, Ear, &c. cannot come under that Denomination.

4^{thly}, ^h Fustigatio, the Bastinado is a punishment for ^h D. 48. 19. Freemen of ^{28. 2.} inferior Rank; but ⁱ Bondmen were punished by Whipping and ⁱ D. 48. 19. Scourging. ^{28. 4.}

R r r r

Therefore

^h Honestiores Fustibus non subjiiciuntur. D. 48. 19. 28. 2.

Therefore St. Paul argued that he ought not to have been scourged, being a Roman Citizen, Acts xvi. 37. The Bastinado is a common Punishment amongst the Turks at this day. Gothofred. ad l. 7. D. de poenis. But in England Whipping and Scourging is the proper Punishment, and not the Bastinado.

5^{thly}, Imprisonment has been reckon'd also amongst the Punishments. But it ought not to be ^kperpetual, because it is rather to be esteem'd a Confinement for the present than a Punishment.

By the Canon Law and Custom of most Countries perpetual Imprisonment is in use. c. quamvis. de poenis in 6. So are publick Work-houses and Bridewells, though they were not allow'd by the ¹Civil Law.

6^{thly}, ^m Infamy was a common Punishment amongst the Romans. It is a Diminution of a Man's Credit and Reputation, by which one is not to be reckon'd in the number of good and honest Persons. Disgrace alone then was thought a sufficient guard to the Laws.

There is an Infamy of Law and of Fact.

1. An Infamy of Law is where the Law declares any Person to be Infamous. This may be inflicted three several ways. 1. Where the Law declares some Persons to be infamous without any Judicial Sentence. As when one turns ⁿ Stage-Player for gain, or is a ^o griping Usurer, or takes Use upon Use, &c. 2. ^p By a Judicial Sentence when one is pronounced guilty of a Crime. 3. ^q By the nature of the Punishment, which may be inflicted without Judicial process, as when a Soldier is cashier'd for Cowardice, ^r or when one hath receiv'd the Bastinado upon just Cause.

^s Infamy of Fact is when one is esteemed a scandalous Person amongst creditable and good Men. As an Adulterer, Thief, &c. This is not properly Infamy, for we ought to be guided by Law, and not by the Opinion or Fancy of private Persons.

The ^t Effect of Infamy is that those who are declared to be infamous are incapable of Dignities and Honours. Neither can they be Judges or ^u Advocates, or ^v Witnesses, or ^x Heirs in a Testament. But those that are Infamous in fact only, are not subject to these incapacities. But both are capable of burthensome Offices; for otherwise they would be honour'd, not punished. Tho' an innocent Man is declared Infamous by Sentence or by Condemnation, yet the Sentence must be taken for Truth; for it would be absurd to make a Question after Trial.

^y Infamy ceases and is abolished by lapse of time, if it was only temporal, or by the particular restitution or pardon of the Prince.

7^{thly}, A Fine or pecuniary Mulct is reckon'd amongst the Punishments which are not Capital. This being inflicted, the Sentence ought to be presently executed. ^z For the Debtors are indulged a time

time for payment after the Condemnation, yet there is no reason that Criminals should have such favour. Neither shall the Criminal be allow'd the *Cessio bonorum*, or the liberty to pay only as far as his Estate will extend; as is granted in the case of Debt; ^a for if he is not able to discharge the Fine, he shall undergo a Corporal Punishment in lieu of it. ^{D. 48. 19.}

8thly, An *Arbitrary* Punishment is where no certain Punishment is directed by the Law, but a Punishment is assign'd according to the discretion of the Judge. This takes place in Misdemeanors, and Crimes which have no particular name in the Law. ^b Thus one may be made incapable of all publick Offices for a Time or for ever, &c. ^{D. 48. 19.}

Vide Antea, Book 3. Chap. 7. pag. 250.

In England the usual Punishments in Treason are Drawing, Hanging and Quartering, or Beheading (unless for counterfeiting Coin) but Drawing and Burning only for Women; Hanging in Robbery or Grand Felony; Burning in the Hand for lesser Felonies, and for Manslaughter as distinguished from Murther; Outlawry, Forfeiture of Land and Goods in the greatest Crimes. But sometimes Forfeiture only of Goods, Pillory, Fine, Imprisonment, cutting off the Hands or Ears, Whipping, &c. for the greater or lesser Misdemeanors. And so by the Canon Law the Punishments are, the Major and Minor Excommunication, Ecclesiastical Interdicts, Degradation, Deprivation ab Officio & Beneficio, Suspension, &c.

Let these Rules be observ'd concerning Crimes and Punishments.

^c Crimes ought not to go unpunished.

^d But it is better that a Crime should be unpunished than an innocent Man suffer for it.

^e Mere Thoughts are not punishable by Human Laws.

^f An Endeavour to commit a Crime is not punishable, or is to be more gently corrected than a Crime perfected and consummated; except in Offences of High Nature. C. 9. 8. 5. D. 48. 8. 1.

^g Crimes committed in a sudden Heat of Passion or through just Grief, or thro' Negligence are to be more mildly punished than Crimes committed with Design and Deliberation. D. 48. 8. 1. 5.

^h Crimes long ago committed, or Criminals under long Imprisonment are to be punished with more Moderation than those Crimes committed or those Criminals convicted lately and as of yesterday.

ⁱ He that commits an Offence by Command of his Superior is more mildly

^c D. 9. 2. 51.

^d D. 48. 19.

^e D. 48. 19.

^f D. 2. 2. 1.

Deut. xiii. 5.

& seqq. 19.

^g D. 48. 8. 14.

^h D. 50. 17.

ⁱ D. 48. 19.

^j D. 50. 17.

mildly ^{157.}

^c Impunita maleficia esse non oportet. D. 9. 2. 51. 2.

^d Satius est impunitum relinqui facinus nocentis quam innocentem damnari. D. 48. 19. 5.

^e Cogitationis poenam nemo patitur. D. 48. 19. 18.

^f Quid obsuit conatus cum Injuria nullum habuerit effectum. D. 2. 2. 1.

^g In maleficiis voluntas spectatur non Exitus. D. 48. 8. 14.

Maleficia voluntas & propositum Delinquentis distinguit. D. 47. 2. 53. -- *Forè in omnibus poenabilibus Judiciis & etati & imprudentia succurritur.* D. 50. 17. 108.

^h Non eo modo puniendos eos qui longo Tempore in reatu agunt quàm eos qui in recenti sententiam excipiunt. D. 48. 19. 25.

ⁱ Ad ea quæ non habent atrocitatem facinoris vel sceleris ignoscitur servis si vel Dominis vel his qui vice Dominorum sunt obtemperaverint. D. 50. 17. 157. -- *Qui Jussu Judicis aliquid facit non videtur dolo male facere, qui parvo nocisse debet.* D. 50. 17. 167. 1. -- *Is Damnum dat qui jubet Dare.* D. 50. 17. 169.

mildly to be punished than He that commands; or in small Offences he may be pardon'd.

^k D. 48. 19. 16. ^k He that gave *Counsel* and *Direction* to commit an Offence may be punished with the same Punishment as He that committed it, if the Crime had not been committed at all without such Direction. D. 48. 5. 12 & 14.

^l D. 47. 2. 50. 3. ^l The *Accessory* may be punished as severely as the *Principal* if He assisted at the time when the Crime was committed. But if He assisted long before the Fact was committed, or *afterwards*, He may be punished with more Moderation.

^m D. 50. 17. 154. ^m He that is guilty himself ought not to demand that another should be punished.

ⁿ D. 48. 19. 11. ⁿ In Punishments a Judge ought not to affect Severity or Clemency.

^o D. 48. 19. 42. ^o Yet Penal Laws ought to be construed in the kindest and most moderate sense as to Punishment, and when the Law is dubious.

^p D. 48. 9. 3. But a Penal Law tho' it cannot be Extended in the kind or nature of the Punishment, yet it may sometimes be extended to comprehend more ^p *Persons* than are directly named, as when they are of equal Degree in the case of Parricide; and also the Law may be extended by interpretation as to the ^q *Crime* which arises from an illegal Act; tho' that Crime was not designed to be committed. For the Intention of the Legislator ought to be considered in Penal as well as in Civil Laws.

^r D. 50. 17. 37. ^r He that may absolve may condemn.

^s D. 50. 17. 125. ^s But the Law is more inclin'd to absolve than condemn.

^t D. 50. 27. 102. ^t He that disobeys the Commands of the Prætor by word of mouth, is as Disobedient as He that contemns his Edict.

^u D. 48. 19. 6. 1. ^u Punishments ought to be inflicted publickly for Example-sake.

^w D. 50. 17. 134. 1. ^w The Punishment ought to over-balance the Advantages that were made by the Crime.

^x D. 48. 19. 1. 3. ^x Those that cannot pay a pecuniary Mulct, may suffer Corporal Punishment in stead of it.

Punishments

^k Suadendo juvisse sceleris est instar. D. 48. 19. 16. --- Consilium dare videtur qui persuadet & impellit, atq; instruit consilio ad furtum faciendum. D. 47. 2. 50. 3. --- Sed qui tantum Consilium dedit atq; hortatus est ad furtum faciendum non tenetur furti. I. 4. 1. 11.

^l Opem fert qui Ministerium atq; Adjutorium ad suscipiendas res præbet. D. 47. 2. 50. 3.

In maleficiis Ratihabitio mandato æquiparatur. D. 50. 17. 152. 1.

^m Illi debet permitti pœnam petere, qui in Ipsam non incidit. D. 50. 17. 154. --- Frustra sibi fidem quis postulat ab eo servari cui fidem à se præstitam servare recusat. X. De Reg. I. 75. in 6.

ⁿ Perspiciendum est Judicanti ne quid aut durius aut remissius constituatur quam causa deposcit. D. 48. 19. 11.

^o Interpretatione Legum pœnæ molliendæ sunt potius quam asperandæ. D. 48. 19. 42. --- In pœnalibus causis benignius interpretandum. D. 50. 17. 155. 2.

^r Nemo qui condemnare potest absolvere non potest. D. 50. 17. 37. Qui damnare potest, is absolvendi quoq; potestatem habet. D. 42. 1. 3.

^s Favorabiliores Rei potius quam Actores habentur. D. 50. 11. 125. Odiâ restringi & Favores convenit ampliari. 15. de Reg. Jur. in 6.

^t Qui vetante Prætoris fecit, hic adversus Edictum fecisse dicitur. D. 50. 17. 102.

^u Pœnâ Homines afficiuntur ut exemplo deterriti minus Delinquant. D. 48. 19. 6. 1.

^w Nemo ex suo Delicto meliorem suam Conditionem facere potest. D. 50. 17. 134. 1.

^x Præsides eis qui pœnam pecuniariam Egentes eludunt coercionem extraordinariam inducant. D. 48. 19. 1. 3.

- ^y Punishments ought not to be extended to the Heirs, &c. of the Criminal; for the principal Design of Punishment is Reformation. ^{D. 48. 19. 20.}
- ^z Those who by reason of Infancy, &c. do not understand the Distinction betwixt Good and Evil ought not to be punished. ^{C. 9. 47. 7.}
- ^a A Minor that is near Fourteen years of Age may be punished as a Criminal. ^{D. 50. 17. 3.}
- ^b In Punishments the Quality, Sex and Age of the Criminal ought to be considered. ^{D. 48. 19. 9. 11.}
- ^c Also there ought to be severer Punishment, when one offends or injures Parents, Masters or Magistrates. ^{D. 48. 19. 16. 3.}
- ^d The Place too ought to be regarded, as whether the Crime was committed in the Temple or Market-place, or in private. ^{D. 48. 19. 16. 4.}
- ^e The Time, (as whether by Night or Day, whether the first, second or third time) ought to create a Difference in the Punishment. ^{D. 48. 19. 16. 5.}
- ^f The Quality and the Quantity of the Thing stolen, &c. and the manner of doing the wrong ought to encrease or diminish the Punishment. ^{D. 48. 13. 4. 2. 8 D. 48. 19. 16. 7.}
- ⁱ Tho' a Crime is punishable by several Laws, the Criminal shall be punished but once. ^{C. 9. 18. 1. D. 48. 2. 14.}
- ^k Where a Mulct is Arbitrary and at the Discretion of the Court, Regard ought to be had to the Poverty or Wealth of the Criminal; but not where the Fine is imposed by Law. ^{D. 50. 17. 173.}
- ^l When one suffers a Punishment for his own fault, no one is bound to make him amends for it. ^{D. 50. 17. 46.}

The

- ^y Si pœna alicui irrogatur, Receptum est ne ad Hæredes transeat. D. 48. 19. 20. -- Ex Delicto defuncti Hæres teneri non Debet. D. 50. 17. 38.
- In Hæredem non solent Actiones transire quæ pœnales sunt ex maleficio. D. 50. 17. 111. 1.
- Unusquisque ex suo admissio sorti subicitur. D. 48. 19. 26. --- Peccata suos Teneant Authores; nec ulterius progrediatur metus quam Reperiatur Delictum. C. 9. 47. 22.
- ^z Impunitas Delicti propter ætatem non datur, si modo in eâ quis sit in quam Crimen quod intenditur cadere potest. C. 9. 47. 7.
- ^a Pupillus qui proximus pubertati est capax est furandi & injuriæ faciendæ. D. 50. 17. 111.
- ^b Sciendum est Discrimina esse pœnarum, neq; omnes eadem pœna adfici posse. D. 48. 19. 9. 11.
- Ferd in omnibus pœnalibus judiciis & ætati & imprudentiæ succurritur. D. 50. 17. 108.
- ^c Persona spectatur ejus qui fecit & ejus qui passus est. D. 48. 19. 16. 3. Levis duntaxat castigatio concessa est Docenti. D. 9. 2. 5.
- ^d Locus facit ut idem vel Furtum vel Sacrilegium sit. D. 48. 19. 16. 4.
- Atrox injuria æstimatur ex Loco. l. 4. 4. 9.
- ^e Tempus discernit emanforem à fugitivo, Furem Nocturnum à Diurno. D. 48. 19. 16. 5.
- ^f Sacrilegia extra ordinem puniuntur. D. 48. 13. 4. 2.
- ^g Quantitas discernit Furem ab Abiged. D. 48. 19. 16. 7.
- ^h Plus est Hominem veneno extinguere quam occidere gladio. C. 9. 18. 1. --- Palam delinquentes ut errantes majore pœnâ excusantur, clam committentes ut contumaces plectuntur. D. 23. 2. 68.
- Nimum multis personis grassantibus exemplo Opus est. D. 48. 19. 16. 10.
- ⁱ Nemo ob idem crimen pluribus Legibus reus fiet. D. 48. 2. 14.
- ^k In condemnatione Personarum quæ in id quod facere possunt damnantur, non totum quod habent extorquendum est, sed & ipsarum ratio habenda est ne egeant. D. 50. 17. 173. Inter Mulctam & Pœnam multum interest. D. 50. 16. 131. 1. & l. 244.
- ^l Quod à quoquam Pœnæ nomine exactum est, id eidem restituere nemo cogatur. D. 50. 17. 46. Quod quis ex culpa sua Damnum sentit, non intelligitur sentire. D. 50. 17. 203.

ffff

- ^m D. 50. 17. ^m The Punishment due to a Crime committed ought not to be en-
 138. 1. creased by reason of any thing that happens afterwards.
ⁿ D. 48. 21. 1. ⁿ A Man must be pardon'd that uses unjust Methods to save his
 Life.

I have now shewn in this last Book. 1. What Persons are requisite to a Trial in Judicature. 2. The Cause or Question to be try'd, with the nature of Proof in general and in particular. 3. The Form and Manner of the Proceedings in *Civil* and *Criminal* Causes.

And as I intended at the entrance of this Work, I have consider'd (as plainly and distinctly as I was able) the three Objects of the Law, *viz. Persons, Things* or Rights, *Actions* or Judicature.

^m *Nunquam crescit ex post facto præteriti Delicti æstimatio.* D. 50. 17. 138. 1.

ⁿ *Ignoscitur ei qui sanguinem suum qualiterqualiter redemptum velit.* D. 48. 21. 1. *In omnibus causis, præterquam in sanguine, qui Delatorem corrumpit pro convicto habetur.* D. 47. 15. 7.



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